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SUPREME COURT OF THE UNITED STATES RODAK, JR., CLERK

OCTOBER TERM, 1977

No. 77-1163

DR. E. RICHARD FRIEDMAN, et al.,

Appellants

DR. N. JAY ROGERS, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

#### JURISDICTIONAL STATEMENT

JOHN L. HILL Attorney General of Texas

DAVID KENDALL First Assistant

STEVE BICKERSTAFF Assistant Attorney General

DOROTHY PRENGLER Assistant Attorney General

RICHARD ARNETT Assistant Attorney General

P. O. Box 12548 Capitol Station Austin, Texas 78711 (512) 475-3131

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Attorneys for Appellants in their Official Capacities

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# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1977 \* \* \* No. \_\_\_\_\_\_

DR. E. RICHARD FRIEDMAN, et al.,
Appellants

v.

DR. N. JAY ROGERS, et. al.,

Appellees

#### JURISDICTIONAL STATEMENT

.

This appeal is from a judgment of the United States Three-Judge District Court for the Eastern District of Texas, entered on October 27, 1977, declaring Sections 5.13(d) and 5.09(a) of the Texas Optometry Act, Art. 4552, Tex. Rev. Civ. Stat. Ann., to be unconstitutional in part and enjoining the enforcement of such statutes. The suit was brought on August 25, 1975, by one member of the Texas Optometry Board, Dr. N. Jay Rogers, against the remaining five members of the Board, Dr. E. Richard Friedman, Dr. John Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Salvador S. Mora, both in their individual and official capacities. W. J. Dickinson, both individually and as President of the

Texas Senior Citizens Association, Port Arthur, Texas Chapter, intervened as a Plaintiff in the District Court, and the Texas Optometric Association, Inc., intervened as a Defendant. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

#### OPINION BELOW

The opinion of the District Court for the Eastern District of Texas, Beaumont Division, entered on September 12, 1977, is reported at 438 F. Supp. 428. A copy of that opinion is attached hereto in the Appendix. The Final Judgment of the Court below, entered on October 27, 1977, is not reported, and that judgment is reproduced in the Appendix.

#### JURISDICTION

This suit was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§1331, 1343, 2201, 2281, and 2284 in the United States District Court for the Eastern District of Texas, to enjoin as unconstitutional the enforcement of Sections 2.02, 5.09(a), 5.13(d), and 5.15(e) of the Texas Optometry Act. A three-judge district court was convened to hear this cause as then required by 28 U.S.C. §§2281 and 2284. The final judgment of the court was entered on October 27, 1977. The judgment declared a portion of Sections 5.09(a) and 5.13(d) of the Act unconstitutional and enjoined Defendants from enforcing such provisions. Notice of appeal was filed in the court below on December 20, 1977. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b). Jurisdiction is sustained by the following cases which required this case to be heard by a three-judge district court and recognize a direct appeal to this Court from

judgments thereof. Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977); Ohio Bureau of Employment Services v. Hodorz, 431 U.S. 471 (1977); Chapman v. Meier, 420 U.S. 1, 14 (1975).

#### STATUTE INVOLVED

As noted above, the Court below held that Section 5.13(d) of the Texas Optometry Act, Article 4552, Vol. 13, Tex. Rev. Civ. Stat. Ann., 449, 481, was unconstitutional and restrained its enforcement. The statute reads, in pertinent part, as follows:

Section 5.13(d). No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas....

#### **QUESTIONS PRESENTED**

- Whether the lower court erred in holding Article 4552-5.13(d) unconstitutional under the First Amendment as an unwarranted restriction on the free flow of commercial information.
- II. Whether the injunction issued by the Court below should be vacated under Rule 65(d), Federal Rules of Civil Procedure, because it is overbroad, it does not specifically state what action is enjoined, and it encompasses issues not raised or litigated in the court below.
- III. Whether certain Orders Pendente Lite entered by the court below exempting individual optometrists from certain provisions of the Texas Optometry Act should be vacated because such orders are

overbroad, do not specifically state what provisions the Board is prohibited from enforcing, and encompass issues not raised or litigated.

#### STATEMENT

As noted above, the lower court ruled that Sections 5.09(a) and 5.13(d) of Article 4552 were unconstitutional in part. Since Appellants perceive no meaningful distinction between the prohibition of price advertising contained in Section 5.09(a) and that involved in Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977), the State has elected not to burden this Court with a fruitless appeal of this issue. However, on the basis of the State's long experience with regulation of the practice of optometry. Appellants believe that Section 5.13(d), which prohibits the practice of optometry under a trade name, is essential to the protection of the public health, and appeal the decision of the court below holding Section 5.13(d) unconstitutional. Appellants additionally appeal from the Final Judgment below since the injunction issued does not comply with the requirements of Rule 65(d), Federal Rules of Civil Procedure. For this same reason the Orders Pendente Lite entered by the court below should be vacated.

The prohibition of the practice of optometry under a trade name was originally adopted by the Optometry Board on December 21, 1959, as a part of the Professional Responsibility Rule. This action was taken subsequent to the overwhelming vote of optometrists licensed in Texas. Appellee Board member herein, together with his brother and another trade name owner, filed suit challenging the Rule. The Rule was upheld on the basis that the use of a trade name by optometrists had been abused to the detriment of the public. Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex. 1967), cert. denied, 389 U.S. 52 (1967) [hereinafter Carp].

Prior to the 1969 legislative session, Appellee herein participated in a committee of legislators and optometrists which drafted the present Article 4552. All members of the committee agreed upon the compromise, including Section 5.13(d). Appellee now challenges the statute he helped create and has persuaded the lower court that Section 5.13(d) is unconstitutional. This ruling is erroneous. The State's proven interest is clearly sufficient to justify the incidental, indeed negligible, restriction upon the flow of commercial information which results from the trade name prohibition.

#### ARGUMENT AND AUTHORITIES

I. THE LOWER COURT ERRED IN RULING THAT THE PROHIBITION OF PRACTICE UNDER A TRADE NAME IS VIOLATIVE OF THE FIRST AMENDMENT

#### A. GENERALLY

Section 5.13(d) provides:

No optometrist shall practice . . . optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas . . . .

The lower court offered two justifications for its holding that this prohibition violated the First Amendment. First, a trade name is encompassed within the meaning of advertising since trade names call public attention to the product: "people identify the name with a certain quality of service and goods." (App. at 10). Second, the use of a trade name is protected "as part of the consuming public's right to valuable information . . . as to certain standards and quality and

availability of particular routine services." (App. at 10). In reliance upon Bates v. State Bar of Arizona, supra, and Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976) [hereinafter Bates and Virginia], the lower court held Section 5.13(d) violative of the First Amendment. In so doing, the court failed to analyze sufficiently both the facts of the case at bar and the applicable authorities. Section 5.13(d) is constitutional as a regulation of conduct which is based upon legitimate and important state interests. Any restriction upon First Amendment rights is incidental and does not significantly restrict the flow of information. Furthermore, Section 5.13(d) should be upheld as a reasonable restriction upon the manner of expression.

There is no doubt that Section 5.13(d) is not violative of the equal protection clause or the due process clause of the Fourteenth Amendment. The State has clearly satisfied the requirements of the Constitution that its regulation of the optometric profession be rationally related to the public welfare. Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Carp, supra; South Carolina Board of Examiners in Optometry v. Cohen, 180 S.E.2d 650 (S.C. 1971); See City of New Orleans v. Duke, 427 U.S. 297 (1976); Matthews v. Lucas, 427 U.S. 495 (1976). The issue thus becomes whether an otherwise valid restriction upon the conduct of a licensee may be held violative of the First Amendment.

The court below purportedly relied on Bates and Virginia but ignored both the language of those decisions and other applicable rulings of this Court. In Bates and Virginia this Court was dealing with statutes which were directed at expression alone; the asserted protection of the public welfare was "protection based in large part on public ignorance." Virginia, supra at 769. Since "[t]he advertising ban [did] not directly affect

professional standards one way or another," the states involved were clearly suppressing information based on its content. Virginia, supra at 769. See also Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977). Neither Bates nor Virginia involved a statute such as Section 5.13(d) which regulates conduct and which affects freedom of expression only incidentally as a restriction upon manner, not content.

#### B. THE LOWER COURT ERRED BY APPLYING THE FIRST AMENDMENT BALANCING TEST

Section 5.13(d) prohibits the practice of optometry under a trade name. Any restriction upon the advertising of a trade name is incidental to a prohibition of conduct. In Pittsburg Press Co. v. Pittsburg Commission on Human Relations, 413 U.S. 376, 389 (1973), this Court stated that a First Amendment interest is

altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

See Bates, supra 97 S.Ct. at 2709; California v. LaRue, 409 U.S. 109 (1973). Similarly, the First Amendment

does not remove a business engaged in the communication of information from general laws regulating business practices.

Savage v. Commodity Futures Trading Commission, 548 F.2d 192, 197 (7th Cir. 1977); See also Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967) (opinion of Harlan, J.); Beneficial Corporation v. Federal Trade Commission, 542 F.2d 611 (3rd Cir. 1976), cert. denied, 430 U.S. 983 (1977). However, Appellee Board member

herein, after years of effort to avoid a regulation of business conduct held valid by the Supreme Court of Texas, now asserts that, since the conduct expresses "commercial information," the state cannot prohibit it. By this reasoning a State could not prohibit chain-store legal and medical practices; its power would be limited to the difficult, if not impossible, task of insuring that individual attorneys and doctors render adequate legal and medical services in an assembly line environment.

The lengths to which the lower court's holding could go is demonstrated by a current suit against Appellants which challenges Section 5.15 of Article 4552 on First Amendment grounds. That section provides for separation of optometrists and opticians in order to avoid, among other evils, relationships which in the past have caused optometrists to accept lower quality lab work out of economic interest. While a First Amendment challenge of this regulation of conduct, which involves no restriction on the flow of information. is ludicrous. Appellants are being forced to defend such challenges arising out of the District Court's ruling below. Similarly, restrictions upon the number of hours a licensee must practice at each of his offices could be challenged since they prevent "chain-store" practices, the advertising of which would constitute "commercial information." See Naismuth Dental Corp. v. Board of Dental Examiners, 137 Cal. Rptr. 133 (Ct. App. Cal. 1977).

In Pittsburg Press Co., supra, this Court held that a state need not permit advertising of illegal commercial activity; the ruling of the court below is that a state may not make a commercial activity illegal because it cannot then be advertised. This holding is an unwarranted and unwise extension of the rulings in Bates and Virginia and significantly intrudes upon the power of a state to regulate its health care professions in the public

welfare. A state should not be required to support its regulations of professional conduct under the properly restrictive limitations of the First Amendment when the regulation at issue concerns conduct and does not restrict content of expression. In this context the First Amendment interest is "altogether absent." Pittsburg Press Co., supra at 389. This Court should reverse the lower court's ruling on this basis and make clear that Bates and Virginia do not disturb the state's power to regulate business, including the conduct of its licensed professionals, a power which has been protected by this Court for at least forty years. See North Dakota State Board of Pharmacy v. Synder's Drug Store, Inc., 414 U.S. 156 (1973); Williamson v. Lee Optical Co., supra; West Coast Hotel Co., v. Parrish, 300 U.S. 379 (1937).

# C. THE LOWER COURT ERRED IN ITS APPLICATION OF THE BALANCING TEST

In our view the lack of a cognizable First Amendment interest mandates reversal of the lower court's ruling. However, even applying those cases which concern a mixture of conduct and expression, the balance weighs in favor of the State.

The applicable standard upon which to review a regulation of conduct which incidentally affects freedom of expression is stated in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

See also Buckley v. Valeo, 424 U.S. 1 (1976); Younger v. Harris, 401 U.S. 38, 51 (1971); Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976).

The restriction upon "alleged First Amendment freedoms" in the instant case is certainly incidental. The communication which the lower court viewed as protected was information concerning a "certain quality of service and goods" and information "as to certain standards and quality, and availability of particular routine services." (App. at 10). The reference to goods is inapposite to this case. Opticians market goods and are permitted to practice under a trade name and advertise prices. Information concerning "quality of service" is of little value to the public; the quality of service varies with the skill and judgment of each optometrist. In Bates this Court noted that "advertising claims as to the quality of services . . . may be so likely to be misleading as to warrant restriction." Id. 97 S.Ct. at 2709. See Bates, supra 97 S.Ct. at 2710 (opinion of Burger, J.), 2713 (opinion of Powell, J.). These references were to information concerning the quality of an individual practitioner. To the extent that nondeceptive advertising of "quality of services" of optometrists is possible, it is not prohibited by the State. The only restriction in this regard is that, since practice under a trade name is prohibited, a trade name may not be used to advertise the quality of service of possibly hundreds of optometrist. Even if non-deceptive advertising of "quality of services" by an individual is possible, clearly such an advertisement proclaiming in one breath the quality of hundreds of individuals would be deceptive per se; in this context it would inevitably constitute "puffing." Thus the lower court's holding that this "quality of service" information is protected by the First Amendment goes farther than this Court was expressly unwilling to go in Bates. Since this case is on the appellate docket the lower court's holding must be reversed in order to prevent its use as precedent. See Hicks v. Miranda, 422 U.S. 332, 344 (1975).

Information concerning the "availability of particular routine services" is admittedly of some value to consumers; however, the lower court referred to no evidence which indicates that the public is presently deprived of such information. In fact, even before the lower court held the price advertising restriction of Section 5.09(a) unconstitutional, an optometrist was allowed to advertise his services. Without the prohibition of Section 5.09(a), a consumer now has access to direct information concerning the availability and the price of "particular routine services;" the communication of such information by any means other than a trade name is not prohibited.

The availability of this information illustrates the negligible impact of Section 5.13(d) on the free flow of commercial information. The prohibition does not restrict content of communication; it does not prevent an optometrist from directly advertising his services or even the quality thereof. What it does is prevent the use of a trade name, which Appellees will argue is the most effective means of communication. Leaving aside doubts concerning the

inherent inaccuracy of a trade name advertisement for the services of hundreds of practitioners, a "government is [not] compelled to permit the most effective means of expression chosen by the citizen." Vietnam Veterans Against the War, Etc. v. Morton, 505 F.2d 53, 58 n.14 (D.C. Cir. 1974). Section 5.13(d) "leaves open to the disputants other traditional modes of communication." Carpenters Union v. Ritter's Cafe, 315 U.S. 722, 728 (1942).

In response to the negligible restriction upon expression involved in Section 5.13(d), the State presented compelling evidence of the importance of its interests in prohibiting practice under a trade name. As discussed in the above Statement, this is not a new problem to the State. In *Carp* the Texas Supreme Court upheld the trade name prohibition in its earlier form as a board rule. The court cited abundant authority for its holding, *id.* at 312, and reviewed the then current state of affairs as follows:

[T]he trade or assumed name practice, like fee-splitting, disrupts the optometrist-patient relationship by concealing the identity and burying the responsibility of the licensed optometrist. . . . Dr. Carp operates seventy-one offices in Texas. He advertises them under the following [ten] trade names . . . . From time to time he adds, drops, or changes the trade name at a particular office although the licensed optometrists employed in that office remain the same. He has purchased and practices under their name although they are no longer associated with the respective offices in any manner. Illustrative of Dr. Carp's trade or assumed name practice is the situation that

exists in Wichita Falls. Within a two-block area in that city, Dr. Carp maintains offices operated under the names of Mast Optical, Luck Optical, and Lee Optical. The same supervisor oversees these three offices. Each office dispenses the same optical goods and services and uses the same kind of equipment. Optometrists are shifted from one location to the other. Dr. Carp's advertising represents to the public that these three offices are in competition with each other thereby creating the false impression that they are each independently owned and operated. Similar situations exist in Dallas and El Paso.

The practice of optometry under a trade name is a holding out to the public that the trade name is licensed. The result is that the identity of the licensed practicing optometrists is hidden behind the unlicensed trade name. Prescriptions belong to those operating the trade name business rather than the prescribing optometrist. The practice is confusing and misleading to the public.

[Emphasis added.]

Texas State Optical's advertising leaves the impression that one of the Doctors Rogers is present at a particular office. Actually they have neither been inside nor seen some of their eighty-two offices distributed generally over Texas. They list their names in phone books in cities where they do not purport to practice optometry and on plaques showing the names of the optometrists who serve particular offices

though they do not in fact practice at such offices. . . . [S]uch practices are deceptive and misleading. . . .

Id. at 311-13. Furthermore, in the instant case the State presented evidence from several witnesses, including a former partner of Dr. Carp, that patient care suffers in a trade name practice. The State demonstrated by abundant testimony and documentary evidence that the control over individual optometrists by the owner of the trade name, the volume of patients each doctor must treat when the trade name owner refuses to employ more personnel, the destruction of the doctor-patient relationship, and the pressures to accept inferior lab work from optical companies connected with the owner of a trade name, virtually insure low quality health care in a trade name practice.<sup>1</sup>

In the face of these justifications, the lower court enjoined the State from prohibiting Appellee Board member, one of the original perpetrators of the state of affairs discussed in Carp, from practicing under a trade name. Just as he did in the 1950's, Appellee proposes to use the trade name utilized by his opticianries and will presumably require "licensees" to use those opticianries. Must the State allow the public's health care to be so jeopardized because of an incidental restriction upon the flow of "commercial information?"

That some but not all of the justifications presented by the State constitute secondary effects from the use of a trade name does not invalidate the State's regulation. Certainly the State may implement a "prophylactic solution instead of one that would have required its own personnel" to attempt the hopeless task of insuring that doctors of optometry do not submit to the inherent pressures of a trade name practice to the detriment of their patients. California v. LaRue, supra at 116; Bates, supra 97 S.Ct. at 2711 (opinion of Burger, J.), 2715 (opinion of Powell, J.). A State must have at least as strong an interest in the health care of its citizens than it does in preventing consenting adults from engaging in immoral conduct. See California v. LaRue, supra. In any event, the primary evils of trade names coupled with the resultant state policy in favor of practice under the licensed name are sufficient to justify the minimal restriction upon expression.

This case, unlike *Bates* or *Virginia*, involves a regulation directly aimed at maintaining high professional standards of *practice*. This Court has long deferred to states in the regulation of practice of its professions for

forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975), citing United States v. Oregon State Medical Society, 343 U.S. 326, 336 (1952). The lower court erred in overbalancing a negligible restriction upon the flow of "commercial information" against the interest of the state in maintaining high quality health care, in part because "a different degree of protection is necessary" in the commercial speech context. Virginia, supra at 771 n. 24; Bates, supra 97 S.Ct. at 2709; See also Bigelow v. Virginia, 421 U.S. 809, 826 (1975).

Similarly, section 5.13(d) may also be viewed as a valid restriction on the manner of expression. This Court has

<sup>&</sup>lt;sup>1</sup>These may be the reasons why twenty states restrict or prohibit the practice of optometry under a trade name.

often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information. [citations omitted.]

Virginia, supra at 771; Bates, supra 97 S.Ct. at 2709; Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Breard v. Alexandria, 341 U.S. 622 (1951). The lower court impliedly recognized that a trade name in itself is meaningless by stating that the information communicated concerned quality and availability of services. The State has placed no other restrictions on communication of this information other than to prohibit deception. The justification for the prohibition here is totally independent from the content of the information allegedly communicated by a trade name; the interest served is among the most significant, protection of public health; and ample alternative channels are left open, including direct advertisement of the information itself. When one views the direct prohibitions upon communication which have been upheld by the federal courts, it would seem highly anomalous for state action which only restricts one manner of communication incident to the protection of public health to be held violative of the First Amendment. See Pittsburg Press Co. v. Pittsburg Commission on Human Relations, supra; Carpenters Union v. Ritter's Cafe, supra; Savage v. Commodity Futures Trading Commission, supra; Beneficial Corp. v. Federal Trading Commission, supra; Mitchell v. King, 537 F.2d 385 (10th Cir. 1976).

II. THE INJUNCTION AND ORDERS PENDENTE LITE ENTERED BY THE COURT SHOULD BE VACATED BECAUSE THEY ARE OVERBROAD

Paragraph 2 of the Final Judgment issued by the District Court enjoins Appellants from enforcing Section 5.13(d) of the Texas Optometry Act in the following language:

Section 5.13(d) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared unconstitutional under the First Amendment of the United States Constitution insofar as it provides that "[n]o optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name or any name other than the name under which he is licensed to practice optometry in Texas." Members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same, or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name. [emphasis added].

(App. at 3). The only trade name provision raised by the pleadings and litigated by the parties was Section 5.13(d) of the Act. In its Memorandum Opinion, the court below addressed only Section 5.13(d). Under the requirements of Rule 65(d), Federal Rules of Civil Procedure, every order granting an injunction and every restraining order must set forth the reasons for its issuance, must be specific in terms, and must describe in reasonable detail, without reference to the complaint or other documents, the acts sought to be restrained. The injunction issued by the Court below is deficient in all these respects.

In United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 581 (1971), this Court stated that

an injunction decree must relate "specifically and exclusively to the pleadings and the proof." In the instant case, the Appellee's Petition challenged only Section 5.13(d) as prohibiting the practice of Optometry under a trade name and contained no reference to "other provisions" as included in the Final Judgment. Appellants were never apprised at any time during the trial of his cause that any "other provisions" were being challenged. Rather, the first indication that the enforcement of other provisions of the Act not raised in the pleadings was sought to be enjoined was contained in Appellees second proposed final judgment filed with the Court subsequent to the Court's issuance of the Memorandum Opinion.

It is fundamental that relief granted by the court in any proceeding must be within "the framework of the pleadings [and] the evidence." Toyosaburo Korematsu v. United States, 323 U.S. 214, 222 (1944). See Solesbee v. Balkcom, 339 U.S. 9, 11 (1950). The court below deviated from the established policy of considering only those issues necessarily raised by the record. In one very ambiguous and vague sentence the District Court has, in effect, enjoined the Texas Optometry Board from enforcing valid provisions of the Act without specifying, in the Judgment or otherwise, what those provisions are. Appellees presented no evidence to show that any provisions of the Act, other than Section 5.13(d), in any way prohibit the practice of optometry under a trade name; Appellants were never given an opportunity to defend such unalleged contentions.

In Schmidt v. Lessard, 414 U.S. 473 (1974) [hereinafter Schmidt], plaintiff challenged the constitutionality of Wisconsin's involuntary commitment laws. The District Court held generally that the statutory scheme was unconstitutional and that the plaintiff and her class were entitled to injunctive relief. This Court held that

the order failed to satisfy the second and third clauses of Rule 65(d).

[T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood ....Since an injunction order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.

414 U.S. at 476. The order in this case, just as in Schmidt, is not specific in terms and does not describe in reasonable detail what acts are enjoined. Consequently this Final Judgment should be vacated for the same reason the order in Schmidt was vacated.

Appellees herein submitted two proposed Final Judgments to the court below. The first proposed judgment did not contain the language of which Appellants now complain. Appellees withdrew their first proposed judgment and submitted a second proposed judgment, which included the overly broad language now a part of the Final Judgment. Appellants filed written objections to the language in question with the court below, and a conference was held by the Managing Judge. Appellees attempted to justify the inclusion of the broad language in the order on the basis of alleged verbal threats by Appellant Board members to the Appellee Board member to the effect that other sections of the statute could be enforced so as to deprive Appellee of the right to practice under a trade name. Appellants requested but were denied an opportunity to refute those unsworn allegations made by Appellees

both in their brief and in chambers. Only after a Memorandum Opinion had been issued by the Court did Appellees realize that they had not asked for in their pleadings nor received in the Opinion all the relief they desired, and only then did they attempt to include broad, nonspecific language in the injunction.

The seriousness of this problem is illustrated by the fact that, at a recent Texas Optometry Board meeting, a party to this suit threatened the Appellant Board members with a possible contempt proceeding if the Board attempted to enforce Sections 5.11 and 5.15 of the Act. Section 5.11 forbids certain types of window displays and signs in an optometric office. Section 5.15 requires the practice of optometry to be completely separate from the business of a dispensing optician. Both of these sections restrict activities other than the practice of optometry under a trade name. An optometrist could easily practice under a trade name without violating Sections 5.11 and 5.15. The justifications for those sections are different from those for 5.13(d). Appellee, however, has argued to the Board that in his opinion and in the opinion of his attorney, such sections in some way prohibit the practice of optometry under a trade name, and that he might be forced to seek an order of contempt against the Board members if they attempted to enforce said sections.

The Texas Optometry Board has been put in the position of having the duty under the laws of the State of Texas to enforce the provisions of the Act, but of not knowing which sections of the Act the Final Judgment enjoins them from enforcing. Furthermore, the threat of a contempt proceeding is being held over their heads. In International Longshoremen's Association, Local 1291 v. Philadelphia, 389 U.S. 64, 76 (1967), this Court

emphasized the importance of Rule 65(d):

The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the Court intends and what it means to forbid.

. The strict interpretation of Rule 65(d) is particularly applicable when the actions of a state administrative body are involved. In Guam v. University Committee to End the War in Viet Nam, 399 U.S. 383, 389, (1970), the Court said that compliance with Rule 65(d) "is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign state." The District Court's order in this case threatens to paralyze enforcement of the statutory scheme for regulation of the practice of optometry. The Final Judgment is so vague that any unrelated provision could be construed by the court to fall under the heading of "other provisions." This situation renders the Board unable to effectively carry out its statutory duties. If this case is not reversed on the merits, the Final Judgment should be vacated, and the case remanded to the District Court with instructions to limit the scope of the injunction to the issues raised at trial and to set forth specifically which sections of the Act are declared unconstitutional.

During the course of the trial of this cause, the District Court issued a number of "Orders Pendente Lite," a representative copy of which has been attached in the Appendix. These orders exempted specified optometrists, none of whom were parties to this suit, from certain provisions of the Act. The court below had no authority to issue these exemptions to non-parties,

and the language in the orders was too broad for all the reasons previously stated with regard to the Final Judgment.

Some of the optometrists named in the orders Pendente Lite had sought leave to intervene. Although intervention was denied by the court below, the court granted the relief these optometrists had sought, thereby granting preliminary relief to persons not parties to the suit. These orders also violated Rule 65(d) because they were, in effect, injunctions issued against the Board to restrain them from enforcing provisions of the Act. Similar to the Final Judgment, the Orders Pendente Lite exempted the named optometrists from the provisions of §5.13(d) and "like trade name prohibitions." These Orders suffer the same basic defect as the Final Judgment. The Optometry Board does not know which provisions of the Act it can enforce against these persons. Accordingly, the "Orders Pendente Lite" should be vacated.

#### CONCLUSION

The ruling of the lower court constitutes an erroneous extension of this Court's holdings in Bates and Virginia. By applying the First Amendment to regulations of conduct rather than expression, the court below has intruded upon the State's well recognized authority to protect its citizens through rational regulation of its health care professions. It is difficult to perceive the limits of a ruling which finds "commercial information" in a mode of business organization, the use of which has been prohibited by a State. This case should be reversed upon the lack of any significant First Amendment interest. Furthermore, the reliance of the lower court upon First Amendment protection of "quality of services" information ignores this Court's statements in Bates and requires reversal of the result reached by the lower court in its application of the balancing test. Finally, portions of the Final Judgment and Orders Pendente Lite should be vacated.

WHEREFORE, PREMISES CONSIDERED. Appellants pray that this Honorable Court note probable jurisdiction of this case and reverse the decision of the Court below with respect to Section 5.13(d) of the Act, or, in the first alternative, that this case be set for argument and plenary consideration, or. in the second alternative, that the Final Judgment and Orders Pendente Lite be vacated and the case remanded to the District Court.

Respectfully submitted.

JOHN L. HILL Attorney General of Texas

DAVID M. KENDALL First Assistant

STEVE BICKERSTAFF Assistant Attorney General

DOROTHY PRENGLER Assistant Attorney General

RICHARD ARNETT Assistant Attorney General

P. O. Box 12548, Capitol Station Texas 78711 (512) 475-3131

Attorneys for Appellants in their Official Capacity

19

DOROTHY PRENGLER Assistant Attorney General

RICHARD ARNETT Assistant Attorney General

#### CERTIFICATE OF SERVICE

I. David M. Kendall, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above referenced cause on behalf of the Appellants in their official capacity. I do hereby certify that three copies of the foregoing Jurisdictional Statement have been served on all parties required to be served by placing same in the United States Mail, First Class, Certified and Postage Prepaid on this \_\_\_\_day of February, 1978, addressed to each of the following: Mr. Robert Q. Keith, 1400 San Jacinto Building, Beaumont, Texas 77701; Mr. Larry Niemann, 1210 America Bank Tower, Austin, Texas 78701; Mr. Brian R. Davis, 408 First Federal Plaza, 200 East 10th Street. Austin, Texas 78711; Mr. John Tucker, Beaumont Savings Bldg., Beaumont, Texas 77701.

DAVID M. KENDALL

# APPENDIX TO JURISDICTIONAL STATEMENT

### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF TEXAS

P. O. Box 231

Beaumont, Texas 77704 October 28, 1977

TO ALL COUNSEL OF RECORD

Re: Civil Action No. B-75-277-CA

> Dr. N. Jay Rogers, ETAL vs. Friedman, Dr. E. Richard, et al

This is to advise that the following instrument was filed in the above cause on October 27, 1977.

FINAL JUDGMENT - Found certain sections of the Optometry Act of Article 4552 revised Civil Statute Civil Statute of Texas unconstitutional and Sect. 2.02 of the act as constitutional. Overruled Motion to dismiss for improper venue; and Parties to Pay own expenses.

Certified copies mailed to all counsel of record.

MURRAY L. HARRIS, CLERK

cc: Hon. Irving L. Goldberg
Hon. Joe J. Fisher
Hon. Wm. Steger
Stephen L. Burkett
Robert Q. Keith
Brian R. Davis
James B. Wesley
Robert L. Oliver
Larry Niemann
John G. Tucker
Joe R. Greenhill, Jr.

y S/S

Deputy Clerk

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF
TEXAS

OCT 27, 1977

Murray L. Harris, Clerk By Deputy Elizabeth H. Smith

Deputy Elizabeth H. Smith Dr. N. Jay Rogers, Plaintiff: W. J. Dickinson. Individually and as President of the Texas Senior Citizens Association, Port Arthur. Texas Chapter. Intervenor: VS. No. B-75-277-CA Dr. E. Richard Friedman. Dr.John B. Bowen. Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora. Defendants: Texas Optometric Association, Inc., Intervenor.

#### FINAL JUDGMENT

In accordance with the memorandum opinion of the Court dated September 12, 1977, in the above styled and numbered cause, it is the Order, Judgment, and Declaration of the Court that:

- 1. Section 5.09(a) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared unconstitutional under the First Amendment of the United States Constitution insofar as it prohibits optometrists from making "any statement or advertisement of price of optometric services or materials." The members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same.
- 2. Section 5.13(d) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared unconstitutional under the First Amendment of the United States Constitution insofar as it prohibits optometrists from making "any statement or advertise-optometry under, or use in connection with his practice optometry, any assumed name, corporate name, trade name or any name other than the name under which he is licensed to practice optometry in Texas." Members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same, or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name.

A True Copy I certify Murray L. Harris, Clerk U.S. District Court Eastern District, Texas By: S/S Civ. Order Book Vol 82 Page 358

- 3. Section 5.15(e) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared constitutional insofar as it requires a mandatory colloquy between the optometrist and his patient regarding referral to a dispensing optician; and such is not in violation of the First or Fourteenth Amendments of the First or Fourteenth Amendments of the United States Constitution.
- 4. Section 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas is declared constitutional insofar as it requires two-thirds of the Optometry Board members to be members of a state optometric association which is recognized by and affiliated with the American Optometric Association; and such provision is not in violation of the First and Fourteenth Amendments of the United States Constitution.
- Defendants' Motion to Dismiss for Improper Venue, as contained in Defendants' Amended Answer, is hereby overruled.
- 6. All other relief not herein specifically granted is denied.
- 7. The Court's finding of fact and conclusions of the law set forth in the Court's memorandum opinion dated September 12, 1977, are hereby incorporated herein.
- 8. This judgment shall be considered for purposes of appeal and otherwise, as a final judgment in this case.
- 9. All parties shall pay costs as heretofore incurred and expended by them, respectively.
- 10. Judgment is not stayed pending the appeal hereof, with the caveat to all parties acting in reliance upon the

Court's findings of constitutionality and unconstitutionality that the Court's rulings are subject to final adjudication upon appeal.

SIGNED this 27th day of October, 1977.

S/S Irving L. Goldberg
United States Circuit Judge

S/S Joe J. Fisher
United States District Judge

S/S William M. Steger
United States District Judge

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

U.S. DISTRICT COURT EASTERN DISTRICT OF TEXAS

SEP 20, 1977

Murray L. Harris, Clerk By Deputy Elizabeth H. Smith

Dr. N. Jay Rogers, Plaintiff:

W. J. Dickinson,
Individually and as
President of the Texas
Senior Citizens Association,
Port Arthur, Texas
Chapter,
Intervenor:

Vs.

No. B-75-277-CA

Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora,

Defendants:

Texas Optometric Association, Inc. Intervenor.

#### MEMORANDUM OPINION

By this civil action, filed pursuant to, inter alia, U.S.C. §1983 and 28 U.S.C. §§ 1343, 2281, et. seq., Plaintiffs seek to enjoin on constitutional grounds enforcement of provisions of the Texas Optometry Act, Tex. Rev. Civ. Stat. Ann. art. 4552-1.0l, et. seq., by the Texas Optometry Board ("Board"). More specifically, Plaintiffs assert the following are violative of their constitutional rights under the first and fourteenth amendments: (1) the prohibition against price advertising, Vernon's Ann. Civ. Stat. art. 4552-5.09(a); (2) the mandatory colloquy between the optometrist and his patient-regarding referral to an optician, Vernon's Ann. Civ. Stat. art. 4552-2.02; and (4) the forbiddance of practice under a trade name, Vernon's Ann. Civ. Stat. art. 4552-5.13(d).

Vernon's Ann. Civ. St. art. 4552-5.09(a) provides in pertinent part that "(n)e optometrist shall publish or display . . . any statement or advertisement of any price offered or charged by him for any opthalmic services or materials . . . ." The recent decision of the Supreme Court in Bates v. State Bar of Arizon, \_\_U.S.\_\_, 97 S.Ct. 2691, 52 L.Ed. 2d \_\_ (U.S. June 27, 1977), makes it clear, however, that any blanket suppression of truthful price advertising is a violation of the right of commercial free speech. The Court therefore holds that art. 4552-5.09(a) is violative of the First Amendment.

The Texas Optometry Act further provides that "(n)o optometrist shall practice... optometry under, or use in connection with his practice of optometry, any... trade name... other than the name under which he is licensed

A True Copy I Certify Murry L. Harris, Clerk U. S. District, Texas Eastern District, Texas Civ. Order Book Vol. 82 Page\_\_\_

By: S/S

In the instant case, Defendants assert that in the first amendment balancing test, any possible harm to the public is far outweighed by (1) the dangers to the doctor/patient relationship, (2) the deterioration of the quality of eye care, (3) the practical "concealment" of the optometrists' identity, and (4) the potential for deception and misrepresentation inherent in an assumed name practice. Based on the evidence and briefs before this Court, the Court finds Defendants' assertions unpersuasive. Although the Defendants rely extensively on supportive language contained in the

decision of the Texas Supreme Court in Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (1967), this Court notes (1) the question before the Texas Court in Carp was not constitutional but whether the Texas board had exceeded its delegated power from the Legislature, (2) the names whose use were in question were those of licensed optometrists who sold Carp their locations, and (3) the Carp decision was rendered well before the recent Supreme Court pronouncements in Va. Pharmacy Bd. v. Va. Consumer Council, supra, and Bates v. State Bar of Arizona, supra.

In both the Bates and Virginia Pharmacy decision, in the process of striking down blanket suppression of truthful advertising, the Supreme Court addressed at great length the importance of commercial free speech in society. The Court declared in Bates that "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." Bates v. State Bar of Arizona, supra at 12. Further, that "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." Ibid. In Virginia Pharmacy, supra at 765, the Court stated

So long as we preserve a predominately free enterprise economy, the allocation of our resources . . . will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

There are two closely related arguments in the instant case for the inclusion of trade names within the

Plaintiffs also assert infringement of their fourteenth amendment rights. This Court notes, however, that the Supreme Court has consistently upheld commercial regulations by states in the face of fourteenth amendment challenges where the state action was grounded in rational bases. See, e.g. New Orleans v. Dukes, 427 U. S. 297 (1976); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955). Since the Court feels, however, that the first amendment challenge is dispositive of this question, it does not address the fourteenth amendment arguments of the parties.

protected first amendment right of commercial free speech. The Court finds both persuasive. The first is that a "trade name" is encompassed within the meaning of advertising and thereby comes under the auspices of the first amendment protection recently granted to advertising by professional people. Therefore, it is argued that any blanket suppression of such commercial speech is unconstitutional. See Bates v. State Bar of Arizona, supra.

The argument for inclusion of trade names within the protective fold of advertising, is generally as follows: trade names, a common law right developed by virtue of being in business, grow as a result of the fact that people identify the name with a certain quality of service and goods, the end result being that eventually the name itself calls public attention to the product.

The second argument is that, even if a trade name is not an integral part of advertising per se, there is a first amendment right to the use of a trade name as part of the consuming public's right to valuable information. More specifically, that the Texas State Optical name (TSO) has come to communicate to the consuming public information as to certain standards of price and quality, and availability of particular routine services.

As stated above, the Court finds both arguments persuasive. Accordingly, this Court, applying the rationale of the advertising cases<sup>2</sup> to the trade name question, holds that blanket suppression of the use of trade names results in unwarranted restriction of the free flow of commercial information and therefore represents an unconstitutional violation of the first

amendment.3

Vernon's Ann. Civ. Stat. art. 4552-5.15(e) requires an optometrist, if he determines a patient needs lenses, to inform the patient (1) that the optometrist will prepare or have the lenses prepared according to the prescription, or (2) that the patient may have the prescription filled by any dispensing optician, not naming any particular optician, but should return for an optometrical examination of the lenses. The article further provides that "(i)f the patient chooses the first alternative, the optometrist may refer the patient to a particular optician . . . ."

Plaintiffs allege that this denies the optometrist the right under the First Amendment to furnish information as to where the patient can have his prescription filled, and that the patient is denied the right to obtain information from his optometrist as to where he can get his lenses made unless he accepts the statutorily required offer by the optometrist. Plaintiffs argue that the optometrist should be allowed to make a referral to a particular optician without the patient first requesting it. In addition, Plaintiffs allege a denial of equal protection because both opthamologists and osteopaths freely refer their patients to particular dispensing opticians. The Court does not find this article violative of Plaintiffs' constitutional rights.

Initially, the Court notes that first and fourteenth amendment rights are not absolute. As the Supreme

<sup>&</sup>lt;sup>2</sup> See Bates v. State Bar of Arizona, \_\_\_U.S.\_\_\_, (Slip Op. No. 76-316), (June 27, 1977); Va. Pharmacy Bd. v. Va. Consumer Council, 425 U. S. 748 (1976).

The Court would point out (1) the rejects the contention that the TSO name misleads the public of who is the responsible optometrist, generally see Bates v. S. Le pur of Arizona, a pra at 29, and (2) the fact that blanket suppression of a trade name is unconstitutional does not prohibit or invalidate regulations having to do with the posting of the optometrist arms present, or the requirement that those optometrists where are posted work so many hours per week at their place of business.

Court observed in Konigsberg v. State Bar of California, 366 U.S. 36, 50-51 (1961).

... general regulatory statutes not intended to control the content of speech but incidentally limited its unfettered exercise, have not been regarded as the type of law the First and Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, . . .

Evidence of a history of "kickbacks," economic tie-ins, and economic coercion peculiar to the optometric field provides a rational basis for a legitimate legislative purpose in enacting this article. See McGowan v. Maryland, 366 U.S. 420, 426 (1961); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).

Further, by its wording, the clear purpose of this article appears to be to prevent the patient from being led to believe that the lense prescription must be taken to a particular optician, but instead requires that he be told that the optometrist can prepare or have the lenses prepared, OR that the patient may have the prescription filled by any optician he chooses. Therefore, the rationale of the recent Supreme Court cases involving advertising and first amendment rights is not applicable, since the effect of the article in question is not to restrict, but to encourage the free flow of commercial information to consumers. See Bates v. State Bar of Arizona, supra, and Virginia Pharmacy Board v. Virginia Consumer Council, supra.

Plaintiffs' equal protection allegations are also unpersuasive. As one three judge court observed in Wall v. American Optometric Association, Inc., 379 F.Supp. 175, 191 (1974), aff'd 419 U.S. 888 (1974), in rejecting an equal protection argument against distinguishing

between opthamologists and optometrists,

The equal protection clause of the Fourteenth Amendment does not require the state to treat different groups in the same manner. Only unreasonable discriminations are forbidden. Williamson v. Lee Optical, 348 U.S. 483 (1955)

Finally, the Court turns its attention to Vernon's Ann. Civ. Stat. art. 4552-2.02, which provides in pertinent part that "[alt all times there shall be a minimum of two thirds of the [Texas Optometry] board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association." Plaintiffs assert that the resulting "4-2" Board composition is a violation of their rights to equal protection and due process.4 More specifically, Plaintiffs allege there is no rational basis for the differentiation between Texas Optometric Association [TOA] and non-TOA optometrist which would justify the distinction made between them for Board membership. Therefore, Plaintiffs assert non-TOA members, though equally qualified, are denied equal access to the governing Board, and are thereby deprived of an equal opportunity to exercise political influence. Plaintiffs also contend that the board composition requirements are unconstitutional because they create an irrebuttable presumption that TOA members are two-thirds more likely to be qualified than non-TOA members. In addition, Plaintiffs allege that the composition of the board deprives them of procedural

The intervening senior citizens also contend that the Board composition leads to statutory interpretations restricting advertising and other methods of communicating commercial information, thereby resulting in an abridgment of their first amendment rights. Whatever merit the senior citizens' claim may have had, the Court feels the argument is mooted by the Court'sadherence, elsewhere in this decision, to Bates v. State Bar of Arizona, supra.

due process, since eventually non-TOA members could be brought or charged before a biased (in favor of TOA members) Board.

On the other hand, Defendants assert that the allegedly unique problems the optometry profession has had in the areas of quality of care, "kick-backs" and tieins, and economic control over many members of the profession, provide a rational basis for state regulation. More particularly, Defendants allege the following rational bases for the requisite board composition:

- (1) TOA members are more likely to be economically independent than non-TOA members;
- (2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and,
- (3) TOA members are more prone to enforce the Texas Optometry Act than non-TOA members.

In addressing Plaintiffs' equal protection arguments, the Court must bear in mind the deference which the judiciary gives to the legislative branch in the area of economic regulations. As the Supreme Court observed in a recent decision, New Orleans v. Dukes, 427 U.S. 297, 303 (1976),

When local economic regulations is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discrimination. See e.g., Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory

discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

The Supreme Court has previously held that "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it...," McGowan v. Maryland, 366 U.S. 420, 426 (1961), and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Madden v. Kentucky, 309 U.S. 83, 88 (1940).

The Court rejects Plaintiffs' attempt to analogize the instant case with Mayor of the City of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974), since (1) there the Court was dealing with an inherently suspect classification (racial imbalance was involved), and (2) the basis of Plaintiffs' argument is found in a possible implication contained in dicta in the Supreme Court opinion.

Nor does the Court feel, in the face of Defendants' asserted rational bases, that Plaintiffs have carried the heavy burden required of them to prevail on equal protection grounds against state regulation.

The Court is also unconvinced by Plaintiffs' substantive due process arguments. Plaintiffs' reliance on three Supreme Court cases, Vlandis v. Kline, 412 U.S. 441 (1973), United States Dept. of Agriculture v. Murry, 413 U.S. 508 (1973), and Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), as a basis for their allegation as to the unconstitutionality of their alleged irrebuttable presumption is ill founded. As contrasted with this case, all three of the cited cases involved fundamental rights, to which the irrebuttable presumption analysis has been limited. In the instant case, the Court must follow the reasoning of those nonfundamental rights cases involving sovereign state

regulation of economic matters. See, e.g., New Orleans v. Dukes, supra; Williamson v. Lee Optical of Oklahoma, Inc., supra. A further consideration in the Court's rejection of Plaintiffs' position is that this article does not conclusively deny any person a Board seat.

The Court also is unpersuaded by Plaintiffs' procedural due process arguments. As one Court has noted, "there is no federal constitutional requirement to the effect that legislators and rule makers must be free of bias or interest . . . . " Wall v. American Optometric Association, Inc., supra, Wall and Gibson v. Berruhill. 411 U.S. 564 (1972) are both readily distinguishable from the instant case for several reasons: (1) those cases were brought after the optometry boards in question had brought charges against the optometrist plaintiffs, therefore they speak directly only to the due process issues which surround disciplinary adjudications; (2) in those cases the board had rule-making power, which they had exercised, while in the instant case the Texas Board has no rule-making power, but only power to enforce what the legislature had mandated; and (3) all members of those boards were members of the State Optometrical Association, while here one-third of the Board is composed of non-TOA members.

In deciding in the face of the instant challenge that Vernon's Ann. Civ. Stat. art. 4552-2.02 is not violative of the Constitution, the Court does not address the potential constitutional problems if, in the future, non-TOA members should be charged and brought for a hearing before the Board as presently composed. The Court feels compelled to point out, however, that it is clear "that those with substantial pecuniary interest in legal proceedings should not adjudicate [such] disputes." Gibson v. Berryhill, supra. Further, the Court points out that "'[m]ost of the law concerning disqualification because of interest applies with equal

force to . . . administrative adjudicators.' K. Davis, Administrative Law Text§1204, p. 250 (1972), and cases cited." *Id.* In addition, the Court would note that a constitutionally fatal bias in the statutory composition of a tribunal is not necessarily remedied by an offer of that tribunal to abdicate its statutory function. See *Wall v. American Optometric Association, Inc., supra.* 

We have examined carefully all of Plaintiffs' other allegations and find each of them to be without merit.

Any finding of fact heretofore made which constitutes a conclusion of law is hereby adopted as a conclusion of law and any conclusion of law which is a finding of fact is hereby adopted as a finding of fact.

Counsel are directed to prepare an order in accordance with this Opinion.

SIGNED this 12th day of September, 1977.

S/S Irving L. Goldberg
United States Circuit Judge

S/S Joe J. Fisher
United States District Judge

S/S William M. Steger
United States District Judge

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

FILED

U.S. DISTRICT COURT EASTERN DISTRICT OF TEXAS

**DEC 20 1977** 

Murray L. Harris, Clerk

By

Deputy Joy F. McBride

Dr. N. Jay Rogers, Plaintiff:

W. J. Dickinson, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter,

Intervenor;

Vs.

No. B-75-277-CA

Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora,

Defendants;

Texas Optometric Association, Inc.,

Intervenor.

#### NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Salvador Mora, Defendants herein, appeal to the Supreme Court of the United States from that portion of the final judgment entered in this action on October 27, 1977 declaring Section 5.13(d) of the Texas Optometry Act unconstitutional and enjoining the above named defendants from enforcing said provision.

This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

JOHN L. HILL Attorney General of Texas

S/S

DOROTHY PRENGLER Assistant Attorney General

P. O. Box 12548 Capitol Station Austin, Texas 78711 (512) 475-3131

A True Copy I Certify Murray L. Harris, Clerk U. S. District Court Eastern District, Texas By: S/S S/S

R!CHARD ARNETT Assistant Attorney General

P. O. Box 12548, Capitol Station Texas 78711 (512) 475-4651

Counsel for Defendants in their Official Capacity

S/S

JOHN TUCKER Counsel for Defendants in their Individual Capacity

#### CERTIFICATE OF SERVICE

I, Dorothy Prengler, Assistant Attorney General of Texas hereby certify that a true and correct copy of the foregoing instrument has been deposited in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to all counsel of record: Robert Q. Keith, 1400 San Jacinto Bldg., Beaumont, Texas 77701, Larry Niemann, 1210 American Bank Tower, Austin, Texas 78701 and Brian R. Davis, 408 First Federal Plaza, 200 E. 10th St., Austin, Texas on this the 19th day of December, 1977.

S/S DOROTHY PRENGLER

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DIVISION OF
TEXAS

#### MAR 16 1977

	MURRAY L. HARRIS, CLERK DEPUTY S/S
r. N. Jay Rogers	)
S.	CIVIL ACTION NO. B-75-277-CA
or E. Richard Friedman, Et Al	

#### ORDER PENDENTE LITE

Section 5.13(d) of the Texas Optometry Act, which prohibits an optometrist from practicing under a name other than the name under which he is licensed, is the subject of a direct constitutional attack in this case.

Intervenor's office at 61 Parkdale Plaza, Corpus Christi, Texas, becomes subject to the prohibition of Section 5.13(d) during the pendency of this suit. To avoid the substantial irrevocable expense and disruption attendant to converting such office so as to conform to the mandate of Section 5.13(d), it is accordingly

ORDERED that the office Texas State Optical at 61 Parkdale Plaza, Corpus Christi, Texas, is hereby declared exampt from the prohibitions of Section 5.13(d) and like "trade name" prohibitions of the Texas

Optometry Act until 60 days after final judgment is rendered by this Court herein, or pending further order of the Court.

DONE this 14th day of March, 1977.

S/S United States District Judge

A True Copy I Certify Murray L. Harris, Clerk U.S. District Court Eastern District, Texas By: S/S

> Civ. Order Book Vol. 79 Page 85

## A P P E N D I X VOLUME I

Supreme Court, U. S. FILED

JUN 8 1978

IN THE

MICHAEL RODAK, JR., CLERK

### SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1977

No. 77-1163

E. RICHARD FRIEDMAN, O.D., et al.,

Appellants

VS.

N. J. ROGERS, O.D., et al.,

Appellees

No. 77-1164

N. J. ROGERS, O.D., et al.,

Appellants

VS.

E. RICHARD FRIEDMAN, OD., et al.,

Appellees

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION, INC., et al.,

Appellants

VS.

N. J. ROGERS, O.D., et al.,

Appellees

Appeals From The United States District Court For the Eastern District of Texas

No. 77-1163 Filed February 16, 1978

No. 77-1164 Filed February 16, 1978

No. 77-1186 Filed February 21, 1978

Probable Jurisdiction Noted April 17, 1978

#### IN THE

#### SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1163 No. 77-1164 No. 77-1186

#### Appeals from the United States District Court for the Eastern District of Texas

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#### RELEVANT DOCKET ENTRIES

#### UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

CAUSE NO. B-75-277-CA

#### DATE PROCEEDING

- 8-25-75 Original Complaint
- 8-25-75 Notice request Three Judge Court, by the Plaintiff.
- 9-18-75 Defendant's Answer
- 9-24-75 Amended Answer of Defendants, Dr. E. Richard Friedman, et al
- 10-9-75 Defendants' Motion for Hearing Venue Defense Before Trial.
- 10-17-75 Order signed by Chief Judge, Fifth Circuit, constituting a 3-Judge Court to hear and determine this case as follows: Honorable Irving L. Goldberg; Honorable Joe J. Fisher and Honorable William Steger.
- 10-28-75 Plaintiff's Response to Defendants' Objection to Venue.
- 11-18-75 Plaintiff's Motion to Substitute as Defendant Dr. John W. Davis for Dr. Phil Lewis; cause as to Dr. Phil Lewis to be dismissed without prejudice.
- 11-26-75 Order dismissed without prejudice Dr. Phil Lewis; substituted Dr. John W. Davis as party defendant.
- Motion of the Texas Optometric Association, 1-7-76 Inc., to file Amicus Curiae Brief.

- 1-7-76 Order signed by Judge Fisher, granting Texas Optometric Association Inc., leave to File an Amicus Curiae Brief in cause.
- 1-8-76 Deposition of Lois Ewald, Executive Secretary, Texas Optometry Board.
- 1-16-76 Answers and deposition of Dr. Mel Rockoff.
- 1-26-76 Deposition (oral) of Stanley Boysen with Exhibits.
- 1-29-76 Deposition of Nate Jay Rogers.
- 2-11-76 Motion for Leave to File Amended Answer by Defendant.
- 2-12-76 Motion to Dismiss and Supporting Brief, by Defendants.
- 2-12-76 Plaintiff's Motion for Order Pendente Lite authorizing plaintiff's continued operation of office in Austin, Texas.
- 2-17-76 Order signed by Judge Fisher 2-16-76 granting Defendant leave to amend answer.
- 2-17-76 Defendant's Second Amended Answer.
- 2-17-76 Motion to Intervene by Texas Senior Citizens Association, Port Arthur, Texas Chapter, & W.J. Dickinson, Ind. and as President of said Chapter.
- 2-18-76 Deposition Drs. Salvador S. Mora; John B. Bowen; and Jack Burton.
- 2-18-76 Order signed by Judge Fisher, Denying Motion to Intervene of Texas Senior Citizens Association, Port Arthur Chapter.

- 2-19-76 Deposition of Dr. Hugh Sticksel, Jr.
- 2-19-76 Motion for Summary Judgment by Defendants.
- 2-20-76 Deposition of Dean Chester Phieffer.
- 2-20-76 Oral Deposition of Dr. E. Richard Friedman.
- 2-20-76 Hearing begins, 9:45 A.M., before 3 Judges. Hearing concluded at 1:15 p.m. Further evidence to be presented by discovery method. All discovery to have been presented by May 3, 1976. Simultaneous briefs to be filed by both sides by May 18, 1976. Each side given to May 28, 1976 for reply briefs.
- 2-25-76 Interrogatories to be propounded to Stanley Boysen by plaintiff.
- 3-18-76 Deposition of Stanley Boysen.
- 4-9-76 Renewed Motion to Intervene by Texas Senior Citizens Association of Port Arthur Chapter.
- 4-22-76 Deposition of Dr. Salvador Mora.
- 4-27-76

Order signed by Judge Fisher 4-26-76, on Plaintiff's Motion for Protective Order, that Plaintiff has handed to Defendants photocopies of contracts between plaintiff and Dr. Richard P. McGuire and Dr. Roy S. Moore; contracts shall not be disclosed, exhibited or reproduced in any form; and upon judgment of District Court, contracts to be returned by defendants' counsel to plaintiff's counsel.

- 4-30-76 Sealed copies of contracts between plaintiff and Dr. R.P. McGuire and Dr. Roy S. Moore. Not to be opened other than order of Court.
- 5-5-76 Deposition of Lee Kenneth Benham.
- 5-6-76 Deposition of Dr. Mel Rockoff by Written Interrogatories.
- 5-14-76 Deposition of Dr. Salvador Mora.
- 5-17-76 Deposition of James J. Riley, Jr.
- 6-3-76 Affidavit of W.S. (Bill) Palmer, O.D.
- 6-11-76 Order signed by Judge Goldberg, Judge Fisher and Judge Steger, granting renewed motion of Texas Senior Citizens Association, Port Arthur, Texas Chapter, to Intervene in case.
- 6-11-76 Complaint in intervention of Texas Senior Citizens Association, Port Arthur, Texas Chapter, and W.J. Dickinson, Ind. and as President.
- 6-28-76 Deposition of Cross Interrogatories of Dr. Lee Benham.
- 8-20-76 Deposition of Dr. Robert K. Shannon.
- 8-24-76 Deposition of Dr. Nelson Waldman.
- 8-26-76 Consent to Intervention by Defendants of Intervention of Texas Optometric Association, Inc.
- 8-24-76 Defendants' Motion to Dismiss and Defendants' Answer to Complaint in Intervention by Texas Senior Citizens Assoc.

- 9-13-76 Order signed by Judge Goldberg; Judge Fisher; and Judge Steger, granting leave to Texas Optometric Association, Inc. to Intervene in case.
- 9-13-76 Petition in Intervention by Texas Optometric Association, Inc.
- 9-20-76 Copy of Computer Print-out of all Optometrists licensed to practice optometry in State of Texas.
- 9-20-76 Certificate of Authenticity and correctness of copies of documents signed by Charles Schnabel, Secretary of the Senate of the State of Texas.
- 9-20-76 Certification by Lois Ewald, Sec. to Texas Optometry Board and Custodian of Board's records, that attached 13 items are part of records and true and correct copies.
- 9-20-76 Minutes of Texas Optometry Board, September 1969 through 1975.
- 9-24-76 Texas Optometry Board's Guidelines and Rules, certified by Lois Ewald, Sec. to Texas Optometry Board.
- 10-1-76 Texas Optometric Asso., Inc. Exhibit No. I (CA3-76-1180-G, Shropshire v. Lee Vision Center, complaint Northern District of Texas, Dallas Division.)
- 10-4-76 Compilation of Important Exhibits and Statutes, Deposition Testimony of Dr. Robert K. Shannon.
- 10-12-76 Affidavit of James J. Riley, Jr.
- 10-12-76 Affidavit of Richard Friedman.

- 10-12-76 Affidavit of Stanley Boysen.
- 10-12-76 Affidavit of Tom Creighton.
- 10-13-76 Exhibit No. 2 of Intervenor, Texas Optometric Association. Publication "There's More Than Meets The Eye".
- 11-3-76 Order signed Denying Leave to Intervene to R.E. Hughes and Dr. C.R. Buller, as Plaintiffs.
- 3-16-77 Order Pendente Lite signed by Judge Fisher 3-14-77, that Texas State Optical at 61 Parkdale Plaza, Corpus Christi, Texas, exempt from prohibitions of Section 5.13(d) of Texas Optometry Act until 60 days after final judgment by Court.
- 3-22-77 Order signed Denying Leave to Intervene by Drs. O'Hair and Milloy, as plaintiffs.
- 9-20-77 Memorandum Opinions by Judge Fisher, Judge Goldberg and Judge Steger.
- 10-4-77 Objections to Plaintiff's Proposed Final Judgment by defendants.
- 10-19-77 Memorandum of Authorities in support of Defendants' Objections to Plaintiff's Final Judgment.
- 10-27-77 Final Judgment Found Certain Sections of the Optometry Act of Article 4552 revised Civil Statute of Texas unconstitutional and Sect. 2.02 of the act as constitutional.
- 12-20-77 Notice of Appeal to the Supreme Court of the United States, by Defendants, Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A.

- Sticksel, Jr., Dr. John W. Davis, and Dr. Salvador Mora, from portion of Final Judgment entered on October 27, 1977.
- 12-21-77 Bond for Costs on Appeal, by Defendants, Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Salvador Mora, in the amount of \$250.00.
- 12-21-77 Notice of Appeal to the Supreme Court of the United States, by Plaintiff, Dr. N. Jay Rogers, from portion of Final Judgment entered on October 27, 1977.
- 12-21-77 Notice of Appeal to the Supreme Court of the United States, by Intervenor, W.J. Dickinson, from portion of Final Judgment entered on October 27, 1977.
- 12-23-77 Bond for Costs on Appeal, in the amount of \$250.00, by Plaintiff, Dr. N. Jay Rogers and Intervenor, W.J. Dickinson.
- 12-22-77 Notice of Appeal to the Supreme Court of the United States, by Intervenor, Texas Optometric Association, Inc., from portion of Final Judgment entered on October 27, 1977.
- 12-23-77 Appeal Bond for Costs in the amount of \$250.00 for Intervenor, Texas Optometric Association, Inc.
- 12-30-77 Three Judge Hearing at Beaumont, Texas on February 20, 1976.

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

#### FILED

U.S. District Court
Eastern District of Texas
AUG 25 1975
MURRAY L. HARRIS, CLERK

BY
DEPUTY Beatrice H. Bryan

DR. N. JAY ROGERS

VS.

§ CIVIL ACTION NO. § B-75-277-CA

DR. E. RICHARD FRIEDMAN, ET AL

COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW DR. N. JAY ROGERS hereinafter called plaintiff, complaining of DR. E. RICHARD FRIEDMAN, O. D., DR. PHILIP LEWIS, O.D., DR. JOHN B. BOWEN, O.D., DR. HUGH A. STICKSEL, JR., O.D., and DR. SALVADOR S. MORA, O.D., hereinafter called defendants, and for cause of action would show:

A TRUE COPY I CERTIFY MURRAY L. HARRIS, CLERK U.S. DISTRICT COURT EASTERN DISTRICT, TEXAS

BY: Beatrice H. Bryan

#### ONE: PLAINTIFF

Plaintiff is a resident citizen of Beaumont, Jefferson County, Texas, within the Eastern District of Texas. He is a licensed optometrist and a member of the Texas Optometry Board.

#### TWO: DEFENDANTS

Defendant, Dr. E. Richard Friedman, O.D., is a resident of Dallas, Texas; defendant, Dr. Philip Lewis, O.D., is a resident of Houston, Texas; defendant, Dr. John B. Bowen, O.D., is a resident of Lubbock, Texas; defendant, Dr. Hugh A. Sticksel, O.D., is a resident of Amarillo, Texas and defendant, Dr. Salvador S. Mora, O.D., is a resident of Laredo, Texas. Each of said defendants is a member of the Texas Optometry Board as same is defined by Article 4552 et seq., Revised Civil Statutes of Texas, and are sued individually and in their official capacity as members of the Texas Optometry Board.

#### THREE: JURISDICTION

The Court has jurisdiction under the Vth, VIth, and XIVth Amendments to the Constitution of the United States, together with 28 U.S.C. 1331, 28 U.S.C. §2201, 42 U.S.C. §1983, 28 U.S.C. §2281 and 28 U.S.C. §2284.

#### FOUR: CAUSE OF ACTION

I.

Make-Up of Board

Plaintiff is a licensed optometrist practicing his profession in the State of Texas and has done so since 1939. He practices in association with a number of other licensed optometrists under the trade name Texas State Optical and "TSO".

The Texas Optometry Act was adopted in 1969 as Article 4552-1.01 et seq.¹ Created thereunder is the Texas Optometry Board, which is composed of six (6) members. The Act prescribes:

"At all times there shall be a minimum of twothirds of the Board who are members of a State Optometric Association which is recognized by and affiliated with the American Optometric Association". §2.02.

The only body in Texas "which is recognized by and affiliated with the American Optometric Association" is the Texas Optometric Association. Hence, four members of the Texas Optometry Board as it is presently constituted, are members of the Texas Optometric Association. Membership in said Association has been denied to and is not available to plaintiff.

For a number of years the Texas Optometric Association, its officers, and membership has exerted a full scale campaign to exert legal, political and financial pressure upon plaintiff and his associates in the practice of optometry to repress plaintiff and his type of optometric practice. This effort by the Texas Optometric Association and its membership has been in the Legislative Halls, the Courts of multiple counties, the Executive offices and Administrative agencies of the State of Texas, for the economic gain of defendants and those who are members of the Texas Optometric Association.

The membership of the Texas Optometric Association spent money and substantial lobby efforts to have adopted the Texas Optometry Act in 1969.

Two-thirds of the membership of the Texas Optometry Board, created by said Act, are required by law to be members of the Texas Optometric Association.

Defendants herein, Dr. Friedman, Dr. Bowen, Dr. Sticksel and Dr. Lewis, are all members of the Texas Optometric Association and the Texas Optometry Board.

Defendants, Dr. Lewis and Dr. Friedman, have in the past occupied various and sundry offices within the Texas Optometric Association including the office of President and Vice President.

There are 1,100 optometrists licensed to practice within the State of Texas. Only 450 or so are dues paying members of the Texas Optometric Association. Thus more than a majority of the optometrists are regulated by a factional minority who have legal control and exert full control over the Board and all of its interpretative and regulatory acts.

Such make-up of the Board deprives your plaintiff of constitutional equal protection, and due process; deprives dispensing opticians, who are regulated by the Board but given no representation upon it of equal protection; and deprives members of the public at large of equal protection in that there is no public member upon this regulatory body.

Plaintiff would show that §2.02 of the Act because of the denial of due process, the fatally defective bias of a majority of the Board, the absence of a dispensing optician upon the Board, and the absence of a public member thereupon, is unconstitutional and should be so declared by this Court.

Further references to the Act will be merely to the section, i.e. Section 1.01, without reference to the Article (4552-Revised Civil Statutes of Texas).

#### FOUR: CAUSE OF ACTION

II.

Trade Name

#### A. The Texas Optometry Act states:

"1. The 'practice of optometry' is defined to be the employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision . . . ." §1.02(1)

The practice of optometry may be conducted either by a licensed optometrist (OD) or a licensed physician or surgeon (M.D. or D.O.). Texas Attorney General Opinion No. V-860 (1949).

Likewise, the Act specifically provides that "the fitting of contact lens shall be done only by a licensed physician or optometrist as defined by the laws of this state . . . ." §1.02(3)(A)

#### B. The Act provides:

"No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry any assumed name, corporate name, tradename, or any name other than the name under which he is licensed to practice optometry in Texas; . . . . " §5.13(d)

C. For more than twenty-five (25) years prior to the adoption of the Texas Optometry Act, plaintiff, in partnership with others, has practiced optometry under the tradename Texas State Optical. He continues to do so in some of his offices under an exemption or "grandfather clause" contained in the Act. However, the

exemption is of limited duration and does not afford plaintiff any constitutional protection.

Meanwhile, other of the health care professionals--physicians and surgeons licensed to practice medicine
in this State---are under no such proscription from
practicing optometry under an assumed name or
tradename other than the name under which he is
licensed, and are in fact practicing optometry under
such names in direct competition with your plaintiff.

D. The statutory scheme which allows one and prohibits another profession from practicing optometry under an assumed name is an arbitrary and capricious scheme, not reasonably or rationally related to any legitimate regulatory purpose of the State. This invidious discrimination is State action which violates plaintiff's assurance of equal protection and due process under the XIVth Amendment to the Constitution of the United States.

III.

Restraint of Trade

A Section 5.15(e) provides:

"If, after examining a patient, an optometrist believes that lenses are required to correct or remedy any defect or abnormal condition of vision, the optometrist shall so inform the patient and shall expressly state that the patient has two alternatives for the preparation of the lens according to the optometrist prescription: First, that the optometrist will prepare or have the lenses prepared according to the prescription; and Second, that the patient may have the prescription filled by any dispensing optician (not naming or

suggesting any particular dispensing optician) but should return for an optometrical examination of the lens. If the patient chooses the first alternative, the optometrist may refer the patient to a particular dispensing optician for selection of frames and filling the prescription."

- B. Most optometrists in Texas "fill their own prescriptions for eye glasses and contact lenses" and when they do, they act as dispensing opticians. The dispensing optician "is an artisan qualified to fill prescriptions and fit frames".
- C. Section 5.15(e) unreasonably discriminates between (1) the optometrist who prepares his own prescription or has the lenses prepared according to the prescription, and (2) the optometrist who does not; because it prevents the optometrist from recommending a particular dispensing optician to prepare the prescription.
- D. Section 5.15(e) unreasonably discriminates between the optometrist and the physician (M.D. or D.O.) who practices optometry, because the optometrist cannot freely refer a patient to a dispensing optician and the physician is under no such restriction.
- E. Section 5.15(e) unreasonably discriminates between the optician who is not also an optometrist and the optician who is also an optometrist because it prevents the optician from being recommended freely to prepare a prescription.
- F. Such prohibition is invidious discrimination violative of the 1st Amendment and the Equal Protection Clause of the XIVth Amendment to the Constitution of the United States.

#### IV.

The Act, §4.04(10), provides that the Board may revoke or suspend the operation of any license if it finds that the licensee has "willfully or repeatedly violated any of the provisions" of the Act, and makes each day's violation a criminal misdemeanor offense. §5.18 Thus, plaintiff, restricted and constrained in violation of his constitutional rights, must either forego the expression of his right or risk revocation or suspension proceedings with respect to his license.

#### V.

#### Prayer

WHEREFORE, PREMISES CONSIDERED, plaintiff prays:

- 1. Defendants be cited to appear and answer herein.
- The Court convene a three judge district court in accordance with 28 U.S.C. §2281 and 28 U.S.C. §2284.
- 3. That the full Court declare §§2.02, 5.13(d) and 5.15(e) of the Texas Optometry Act (Article 4552, Revised Civil Statutes of Texas), violative of the free speech and Equal Protection Provisions of the XIVth Amendment to the Constitution of the United States.
- 4. That the full Court permanently enjoin defendants and their successors in office from enforcing the provisions of Article 4552, §§2.02, 5.13(d) and 5.15(e) of the Texas Optometry Act.
- That plaintiff have judgment for costs of Court and such other and further relief as is just, at law or in equity.

MEHAFFY, WEBER, KEITH & GONSOULIN Attorneys for Plaintiff

By s/s Of Counsel

1400 San Jacinto Building Beaumont, Texas 77701

#### A-17

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

DR. N. JAY ROGERS	
v.	
DR. E. RICHARD	CIVIL ACTION NO.
FRIEDMAN, DR. JOHN W. DAVIS, DR. JOHN B.	B-75-277-CA
BOWEN, DR. HUGH A.	
STICKSEL, JR. AND DR.	
SALVADOR S. MORA	

### DEFENDANTS' SECOND AMENDED ANSWER

#### TO THE SAID HONORABLE COURT:

Defendants above named, in accordance with Rule 15(a) of the Rules of Civil Procedure, amend their answer in the above entitled cause so that the same will read as follows:

- 1. Defendants admit the allegations of paragraph 1 of the complaint.
- 2. Defendants admit the allegations of paragraph 2 of the complaint except for the allegation that Defendant Dr. Philip Lewis is a member of the Texas Optometry Board which is specifically denied.
- 3. Defendants deny that this action arises under the Constitution of the United States and deny that there has been any threatened deprivation under color of any status of the State of Texas of any rights, privileges or immunities secured to the Plaintiff or others similarly situated by the Constitution of the United States.

- 4. Defendants admit the allegations of paragraph 4 I., subparagraph 1 of the complaint.
- 5. Defendants admit the allegations of paragraph 4 I., subparagraph 2 of the complaint.
- 6. Defendants admit that the Texas Optometric Association is recognized by and affiliated with the American Optometric Association as alleged in paragraph 4 I., subparagraph 3 of the complaint.
- 7. Defendants admit that four members of the Texas Optometry Board, as it is presently constituted, are members of the Texas Optometric Association as alleged in paragraph 4 I., subparagraph 3 of the complaint.
- 8. Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegation of paragraph 4 I., subparagraph 3 of the complaint that membership in said Association has been denied to and is not available to Plaintiff.
- 9. Defendants deny the allegations of paragraph 4 I., subparagraph 4 of the complaint.
- 10. Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 4 I., subparagraph 5 of the complaint.
- 11. Defendants admit the allegations of paragraph 4 I., subparagraph 6 of the complaint.
- 12. Defendants admit the allegations of paragraph 4 I., subparagraph 7 of the complaint except for the allegation that Dr. Lewis is a member of the Texas Optometry Board which is specifically denied.
- 13. Defendants admit the allegations of paragraph 4 I., subparagraph 8 of the complaint.

- 14. Defendants deny the allegations of paragraph 4 I., subparagraph 9 of the complaint.
- 15. Defendants deny the allegations of paragraph 4 I., subparagraph 10 of the complaint.
- 16. Defendants deny the allegations of paragraph 4 I., subparagraph 11 of the complaint.
- 17. Defendants admit the allegations of paragraph 4 II., subparagraphs A. 1, 2 and 3 of the complaint.
- 18. Defendants admit the allegations of paragraph 4 II., subparagraph B of the complaint.
- 19. Defendants admit the allegations of paragraph 4 II., subparagraph C 1 of the complaint.
- 20. Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 4 II., subparagraph C 2 of the complaint.
- 21. Defendants deny the allegations of paragraph 4 II., subparagraph D of the complaint.
- 22. Defendants admit the allegations of paragraph 4 III., subparagraph A of the complaint.
- 23. Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 4 III., subparagraph B of the complaint.
- 24. Defendants deny the allegations of paragraph 4 III., subparagraph C of the complaint.
- 25. Defendants deny the allegations of paragraph 4 III., subparagraph D of the complaint.
- 26. Defendants deny the allegations of paragraph 4 III., subparagraph E of the complaint.

- 27. Defendants deny the allegations of paragraph 4 III., subparagraph F of the complaint.
- 28. Defendants deny the allegations of paragraph 4 IV., of the complaint.

#### **DEFENSES**

- 1. The complaint fails to state a claim against Defendants upon which relief can be granted.
- 2. The venue of the action made a basis of the complaint does not lie in the United States District Court for the Eastern District of Texas under 28 U.S.C. Section 1391(b).
- 3. Plaintiff lacks the requisite standing necessary to challenge the constitutionality of the Texas Optometry Act.
- 4. Assuming, arguendo, that Plaintiff has standing to prosecute this suit, he has waived such standing by accepting a position and serving on the Texas Optometry Board.
- 5. Plaintiff is estopped from challenging the constitutionality of the Texas Optometry Act by virtue of his sponsoring and procuring its enactment and by enforcing its provisions.

Wherefore, Defendants pray that the complaint of the Plaintiff be dismissed with costs to the Defendants.

JOHN L. HILL
Attorney General of Texas
DAVID M. KENDALL
First Assistant Attorney General
ELIZABETH LEVATINO
Assistant Attorney General
•

ATTORNEY FOR DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES

STUBBEMAN, McRAE, SEALY, LAUGHLIN & BROWDER Vaughn Building Austin, Texas (512) 476-3502 ROBERT L. OLIVER Assistant Attorney General P.O. Box 12548, Capitol Station Austin, Texas 78711 (512) 475-3131

ATTORNEYS FOR DEFENDANTS IN THEIR OFFICIAL CAPACITIES

BY: \_\_\_\_\_\_\_JOE R. GREENHILL, JR.

OF COUNSEL

#### CERTIFICATE OF SERVICE

(omitted in printing)

### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

DR. N. JAY ROGERS	§
VS.	§ CIVIL ACTION NO. § B-75-277-CA
DR. E. RICHARD	\$
FRIEDMAN, DR. JOHN	§
W. DAVIS, DR. JOHN B.	§
BOWEN, DR. HUGH A.	§
STICKSEL, JR., AND DR.	§
SALVADOR S. MORA	§

#### MOTION TO INTERVENE

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Now come the Texas Senior Citizens Association, Port Arthur, Texas Chapter, and W. J. Dickinson, individually and as President of said Chapter, and move this Honorable Court for leave to intervene in the captioned civil action. In support hereof, Movants would show unto the Court the following:

I.

This Motion is filed pursuant to F. R. Civ. P. 24 (a) (2), in that your applicants claim interests relating to the subject matter of the main action, and said applicants are so situated that this action's disposition may impair or impede--in a practical sense--your applicants' ability to protect their interests. Furthermore, your applicants would show that their interests are not adequately protected by existing parties. Accordingly, your applicants claim a right to intervene herein, as a matter of right.

#### II.

In the alternative, Movants pray the Court grant them leave to intervene as a matter of permission and discretion under F. R. Civ. P. 24 (b) (2), in that Movants' Complaint in Intervention, attached hereto, presents questions of law and fact in common with the main action.

#### III.

The Texas Senior Citizens Association, Port Arthur, Texas Chapter, hereby requests leave to intervene qua Association and Chapter. The Texas Senior Citizens Association is a statewide, non-profit corporate organization composed of sixty-three local chapters in the state of Texas. The Port Arthur, Texas Chapter has a membership of approximately 1,100 individuals. Most are wearers and consumers of corrective lenses or eyeglasses. The members are persons of retirement age who rely primarily on Social Security and fixed incomes for economic subsistence. Said Chapter's headquarters and office are located at 910 DeQueen Street, Port Arthur, Texas. Said Chapter's President is Mr. W. J. Dickinson. Mr. Dickinson resides at 3748 Seventh Street, Port Arthur, Texas. The Secretary is Mrs. Elizabeth Terry of Port Arthur, Texas.

#### IV.

Movants, the Port Arthur Chapter and Mr. Dickinson, would show unto the Court that said Chapter and Association were founded and continue to exist so that their members--retirement-age individuals on fixed incomes--may associate with one another for the purposes of acquiring information of interest to their mode of living in terms of the costs of goods and services, the reasons for such costs, the monitoring of the availability of goods and services in the market place,

and the communication of the foregoing information among the membership and throughout a democratic society. Included within the items goods and services whose costs and availability are of acute interest to Movants are the costs and availability of optometric and optical services in the state of Texas.

#### V.

By their Complaint in Intervention, attached hereto, and by compentent proof, Movants would show unto the Court that certain sections of the Texas Optometry Act, Tex. Rev. Civ. Stat. Ann. art. 4552-1 et seq., violate Movants' rights to acquire valuable information in a free society, as guaranteed by the First Amendment of the United States Constitution. Correspondingly, inasmuch as the Port Arthur Chapter exists so that its members may obtain information and engage in communicative association relative to, inter alia, the items complained of in the main suit and in Movants' Complaint in Intervention, the First Amendment rights of said Chapter's members may properly be asserted and vindicated by according standing to the Chapter and its President. Moreover to allow intervention by said Chapter and its President would permit the issues raised by the Complaint in Intervention, and by the main suit, to be resolved in a single proceeding, thus reducing the potential for a multiplicity of suits.

#### VI.

Movants would further represent to the Court that allowance of the intervention prayed herein will not operate to complicate or unduly prolong the trial of the merits. The issues sought to be raised by Movants can be resolved almost entirely, if not entirely, by reference to the proofs to be offered in the main suit. Furthermore, the intervention will not prejudice the Defendants or take them by surprise, for Defendants are fully familiar

with the bulk of the evidence, which is contained in depositions already taken, at which Defendants were represented by counsel. The substantive issues relating to price and other advertising sought to be raised by Movants in addition to those issues already raised by the main plaintiff were fully explored during the depositions. No prejudice or unfair surprise will result to any party by the allowance of the intervention prayed herein. Further, Movants anticipate no need for additional discovery.

#### VII.

Finally, the granting of Movants' application to intervene will, instead of complicating the issues, greatly simplify their presntation and resolution. More specifically, Defendants have asserted, by their Motion to Dismiss, that the main Plaintiff, Dr. Rogers, lacks standing to challenge § 5-15(e) of the Texas Optometry Act, which limits the optometrist's ability to refer patients to particular dispensing opticians. Defendants assert that, since the Texas Optometry Board has not threatened Plaintiff whith disciplinary action under said section, Plaintiff therefore lacks standing to challenge its constitutionality. Further, Defendants have contested main Plaintiff Dr. Rogers' standing to challenge the absence of a public citizen on the Board, since he is not a public citizen as such, but rather a licensed optometrist who, in fact, serves on the Board.

Suffice it to say that these issues of standing, as raised by Defendants, involve somewhat murky inquiries into the case law precedents and the actual facts of this lawsuit. Movants, however, respectfully submit that they unquestionably have standing to raise First Amendment issues on the price advertising, referral and public member matters. See Technical-Hudson Electronics, Inc. v. Dept. of Consumer Affairs,

(C.D.Cal.), 44 U.S.L.W. 2337 (3-Judge Court); Virginia Citizens Consumer Council v. State Board of Pharmacy, E.D.Va. 1974, 373F.Supp. 683 (3-Judge Court), appeal pndg. By their Complaint in Intervention, Movants allege that the above items directly abridge their First Amendment rights as consumers and as citizens who associate for consumer-oriented purposes. Accordingly, the granting of intervention to Movants will conserve, rather than waste, the Three Judge Court's valuable time.

In addition, unless Movants are allowed to intervene, the whole question whether their First Amendment issues shall be heard will turn on whatever resolution the Court makes of the questions relating to the main Plaintiff's standing. Those questions are not easily answered. Therefore, to disallow Movants' application may, as a practical matter, impair or impede Movants' interests which are not adequately protected by the main Plaintiff alone.

WHEREFORE, PREMISES CONSIDERED, Movants Texas Senior Citizens Association, Port Arthur, Texas Chapter, and W. J. Dickinson, individually and as President of said Chapter, respectfully pray the Court grant this application for intervention, accept the filing of the Complaint in Intervention, and for general relief.

Respectfully submitted,

MEHAFFY, WEBER, KEITH & GONSOULIN Attorneys for Plaintiff,

By	s/s	
		Of Counsel

1400 San Jacinto Building Beaumont, Texas 77701

An exact copy of this motion has been properly mailed to counsel for Defendants, on this the 17 day of February, 1976, by placing same in the United States Mail, properly addressed and postage prepaid.

S/S		-1-	
		S/S	

### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

DR. N. JAY ROGERS	§
VS.	§ CIVIL ACTION NO. § B-75-277-C.
DR. E. RICHARD	§
FRIEDMAN, DR. JOHN	§
W. DAVIS, DR. JOHN B.	§
BOWEN, DR. HUGH A.	§
STICKSEL, JR. AND DR.	§
SALVADOR S. MORA	§

#### COMPLAINT IN INTERVENTION

TO THE HONORABLE UNITED STATES DISTRICT COURT:

NOW COME the Texas Senior Citizens Association, Port Arthur, Texas, Chapter, and W. J. Dickinson, individually and as President of said Chapter (hereinafter referred to as "intervenors-Plaintiffs"), and file this, their Complaint in Intervention. Intervenors would respectfully show unto the Court the following:

I

#### JURISDICTION

By virtue of leave granted by the Court, this Complaint in Intervention is filed pursuant to F.R. Civ. P. 24. This is a civil action pending before the Honorable Three-Judge Court, whose jurisdiction is conferred by 28 U.S.C. §§1331, 1343(3) and (4), 2201, and 2281, et seq. The claims for relief presented herein are stated pursuant to 42 U.S.C. §§1983 and the First and

Fourteenth Amendments of the United States Constitution.

II.

#### THE PARTIES

Intervenor-Plaintiff Port Arthur Chapter of the Texas Senior Citizens Association is a member organization in good standing of the Texas Senior Citizens Association, a non-profit Texas corporation composed of sixty-three local chapters in this state. The Port Arthur Chapter has a membership of approximately 1,100 retirement age persons, most of whom are wearers and consumers of corrective lenses and eyeglasses purchased within the State of Texas. The Port Arthur Chapter's headquarters and office are located at 910 DeQueen Street, Port Arthur, Texas. Its President is Intervenor-Plaintiff Mr. W. J. Dickinson, of 3748 Seventh Street, Port Arthur, Texas. Its Secretary is Mrs. Elizabeth Perry, of Port Arthur, Texas.

Founded in 1965, the Port Arthur Chapter exists for the purpose, among others, of uniting retired and fixedincome persons so that they may better inform themselves, and through their united efforts acquire useful knowledge, concerning the cost to the low and fixed-income citizen of goods and services in a society plagued by constantly escalating consumer prices. To those ends, the members of the Port Arthur Chapter gather information, associate with each other concerning the information gathered, and communicate and disseminate information throughout the membership and throughout the community, relative to the consumer costs of goods and services. A matter of particularly acute concern to said Chapter's members, since most are directly affected thereby, is the retail cost of prescription eyeware. This concern includes both the

examining-prescribing aspect of the prescription eyeware business, and the dispensing opticianry aspect. The members of the Port Arthur Chapter seek out and gather information, and collectively associate for the purpose of communicating pertinent information regarding the cost and availability of prescription eyeware among the membership and in the community. One of the principal objectives of this association and communication, for which the Chapter itself serves as a gathering place and clearinghouse for the members, is the identification of sources for reasonably-priced and readily available prescription eyeware goods and services. The Port Arthur Chapter, through its membership, endeavors to encourage greater availability of reasonably priced prescription eyeware: obtains and provides information pertinent to that objective; and exercises collective influence in government and in the marketplace in order to eliminate artificial and arbitrary barriers, in the laws and elsewhere, which tend to perpetuate selfserving economic interests at the expense of low and fixedincome prescription eveware consumers.

Intervenor-Plaintiff Mr. W. J. Dickinson, President of the Port Arthur Chapter, shares the foregoing purposes, goals, and objectives of the Chapter and its members. Like most of the Chapter's members, he, too, is a wearer and consumer of prescription lenses and eyeglasses purchased within the State of Texas.

The defendants, for purposes of this intervention, are the same five members of the Texas Optometry Board who are the defendants in the main suit filed by Dr. N. Jay Rogers. III.

#### FIRST CAUSE OF ACTION

#### Advertising by Optometrists

A. Section 5.09(a) of the Texas Optometry Act, Tex. Rev. Civ. Stat. Ann., Art. 4552-5.09, which is administered and enforced by the Texas Optometry Board, provides as follows:

"Section 5.09. Advertising by Optometrists. (a) No optometrist shall publish or display, or knowingly cause or permit to be published or displayed by newspaper, radio, television, window display, poster, sign, billboard, or any other advertising media, any statement or advertisement of any price offered or charged by him for any ophthalmic services or materials, or any statement or advertisement concerning ophthalmic lenses, frames, eyeglasses, spectacles, or parts thereof which is fraudulent, deceitful, misleading, or which in any manner whatsoever tends to create a misleading impression, including statements or advertisements of bait, discount, premiums, gifts, or any statements or advertisements of a similar nature, import, or meaning."

The foregoing section absolutely prohibits optometrists in Texas from advertising "any price offered or charged . . . for any ophthalmic services or materials" in the name of the optometrist. The foregoing section directly affects intervenors-plaintiffs, and causes them direct injury-in-fact, because it deprives them of valuable and useful information concerning the cost to the consumer of ophthalmic goods and services in the State of Texas. Intervenors-plaintiffs affirmatively allege that they would patronize those optometrists who provide the best services and materials for the lowest

price, if such optometrists could be identified through advertising. Such identification, however, is directly precluded by §5.09(a), and accordingly intervenors-plaintiffs are deprived of true factual information concerning comparative pricing and availability of prescription eyeware. This deprivation violates intervenors-plaintiffs' rights under the First and Fourteenth Amendments, and controlling decisions of the Supreme Court of the United States. Therefore, §5.09(a) is unconstitutional, and its enforcement is due to be permanently enjoined by this Court.

B. Furthermore, as retail consumers of prescription ophthalmic goods and services, and as persons whose constitutional rights are violated by \$5.09(a)'s prohibition of advertising by optometrists, intervenors-plaintiffs affirmatively allege that \$5.09(b) together with \$5.10 of the Act arbitrarily and invidiously discriminate between optometrists who own, operate, or manage a dispensing opticianry and those who do not. Specifically, the former class of optometrists are permitted to advertise, in the name of their opticianries only, by obtaining an advertising permit under \$5.10. The latter class of optometrists, however, are prohibited from doing, or knowingly permitting, any advertising of their goods and services. Sections 5.09(b) and 5.10, in pertinent part, read as follows:

"Section 5.09. Advertising by Optometrists. ... (b) This section shall not operate to prohibit optometrists who also own, operate, or manage a dispensing opticianry from advertising in any manner permitted under any section of this bill so long as such advertising is done in the name of the dispensing opticianry and not in the name of the optometrist in his professional capacity.

"Section 5.10. Advertising by Dispensing Opticians. (a) No person, firm or corporation shall

publish or display or cause or permit to be published or displayed in any newspaper or by radio, television, window display, poster, sign, billboard or any other means or media any statement or advertisement concerning ophthalmic lenses, frames, eyeglasses, spectacles or parts thereof which is fraudulent, deceitful or misleading, including statements or advertisements of bait, discount, premiums, price, gifts or any statements or advertisements of a similar nature, import or meaning.

- (b) No person, firm or corporation shall publish or display or cause or permit to be published or displayed in any newspaper, or by radio, television, window display, poster, sign, billboard or any other means or media, any statement or advertisement of or reference to the price or prices of any eyeglasses, spectacles, lenses, contact lenses or any other optical device or materials or parts thereof requiring a prescription from a licensed physician or optometrist unless such person, firm or corporation complies with the provisions of Subsections (c)-(j) of this section.
- "(c) The person, firm or corporation shall obtain from the board an "Advertising Permit", which permit shall be granted to any person, firm or corporation which is engaged in the business of a dispensing optician in Texas."

The above-described arbitrary and invidious discrimination between two classes of optometrists again violates intervenors-plaintiffs' First Amendment rights to obtain valuable information, and also violates as to those optometrists who do not own, operate, or manage a dispensing opticianry - the Fourteenth Amendment guarantees of substantive due process and

the Equal Protection of the laws. Intervenors-plaintiffs are entitled to raise the non-dispensing optometrists' Fourteenth Amendment rights, because the statutory abridgement of those rights directly dilutes and invades the professional relationships that intervenors would enter into with said optometrists, but for the arbitrary, irrational, and invidious discrimination effected by §\$5.09(b) and 5.10. Accordingly, those sections are due to be permanently enjoined.

IV.

#### SECOND CAUSE OF ACTION

#### **Restraint of Trade**

Section 5.15(e) provides:

"If, after examining a patient, an optometrist believes that lenses are required to correct or remedy any defect or abnormal condition of vision. the optometrist shall so inform the patient and shall expressly state that the patient has two alternatives for the preparation of the lens according to the optometrist prescription: First, the optometrist will prepare or have the lenses prepared according to the prescription; and second, that the patient may have the prescription filled by any dispensing optician (not naming or suggesting any particular dispensing optician) but should return for an optometrical examination of the lens. If the patient chooses the first alternative, the optometrist may refer the patient to a particular dispensing optician for selection of frames and filling the prescription."

Most optometrists in Texas "fill their own prescriptions for eye glasses and contact lenses" and when they do, they act as dispensing opticians. The dispensing optician "is an artisan qualified to fill prescriptions and fit frames."

Section 5.15(e) unreasonably discriminates between (1) the optometrist who prepares his own prescription or has the lenses prepared according to the prescription, and (2) the optometrist who does not; because it prevents the optometrist from recommending a particular dispensing optician to prepare the prescription.

Section 5.15(e) unreasonably discriminates between the optometrist and the physician (M. D. or D. O.) who practices optometry, because the optometrist cannot freely refer a patient to a dispensing optician and the physician is under no such restriction.

Section 5.15(e) unreasonably discriminates between the optician who is not also an optometrist and the optician who is also an optometrist because it prevents the optician from being recommended freely to prepare a prescription.

Such prohibition is invidious discrimination violative of the First Amendment and the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

Said prohibition violates intervenors-plaintiffs' First Amendment rights in that, once again, it deprives them of valuable information relative to the identity and location of firms where they could have their prescriptions filled. It also denies them their First Amendment right to receive information in the sense that if the optometrist who does not fill his own prescriptions could freely refer patients to dispensing opticians, then the patients would obtain valuable and useful information regarding the interests and motives-financial or otherwise - of their optometrists. To eliminate the arbitrary and unreasonable restriction on referrals would cause dispensing opticians to offer their goods and services on a more competitive basis, thus enhancing every optometrist's responsibility to his

patients to identify the most economical sources of quality prescription materials, rather than referring his patients to himself, as is commonly done by most Texas optometrists who fill their own prescriptions. Because §5.15(e) once more dilutes and prevents professional and commercial relationships that would exist but for the section's arbitrary distinctions, intervenors-plaintiffs are entitled to raise not only their own First Amendment rights, but also the Fourteenth Amendment rights of those optometrists against whom the section discriminates - namely, those who do not prepare, or attend to the preparation of, their own prescriptions. Section 5.15(e) therefore, should be permanently enjoined.

V.

#### **Trade Name**

For the most part, this cause of action is adequately set forth by paragraph "FOUR", part II, of the Complaint filed by the main plaintiff, Dr. N. Jay Rogers, which paragraph is adopted herein by reference thereto. In addition, however, intervenorsplaintiffs affirmatively allege that the prohibition of §5.13(d) against the practice of optometry under trade name violates intervenors-plaintiffs' First Amendment rights to receive valuable information about the prices and availability of prescription eyeware. Specifically, the prohibition contained in §5.13(d) frustrates and precludes the economies of scale that would inure to the benefit of prescription eyeware consumers, if optometry could be practiced under trade name by those licensed optometrists who elected to do so. A trade name is a form of communication and information to the public in the sense that it conveys to the public connotations of the cost, nature, and quality of a particular source's product or service. In that respect, the use of a trade name is

analogous to advertising. Yet the use of a trade name for the practice of optometry is forbidden by §5.13(d). Since this prohibition deprives intervenors-plaintiffs of valuable information about the cost, nature, and quality of prescription eyeware services and materials offered by particular optometrists, it violates their First Amendment rights and should be permanently enjoined by the Court.

#### VI.

#### FOURTH CAUSE OF ACTION

#### Make-Up of Board

Intervenors-plaintiffs respectfully adopt by reference all of paragraph "FOUR", part I, of the Complaint filed by main plaintiff Dr. N. Jay Rogers. Intervenors-plaintiffs affirmatively allege, and would show, that §2.02 of the Act, which vests the Texas Optometric Association with a perpetual supermajority control over the regulation of optometry in Texas, violates intervenors-plaintiffs' constitutional rights in the following respects:

First, it violates their rights under the First Amendment and the procedural and substantive aspects of the Fourteenth in that it makes no allowance for a public citizen on the Texas Optometry Board. As non-professional members of the public-at-large, intervenors-plaintiffs have standing to raise this issue.

Second, by vesting the Texas Optometric Association with the above-described supermajority control, §2.02 effectively converts into state action and state policy certain tenets or codes of practice followed by the members of the Texas Optometric Association, and prescribed by the American Optometric Association. Many of these tenets or codes are flagrantly

monopolistic and anticompetitive - for example, those that limit the number of professional practices in which an optometrist may own an interest and those that directly and indirectly forbid advertising by optometrists. There is no rational basis whatever for the Texas legislature's explicit and implicit action in the foregoing restpects.

Third, §2.02's implicit canonization of the Texas Optometric Association's tenets and codes operates, with respect to intervenors-plaintiffs, as state action abridging their fundamental rights to receive valuable and useful information, as guaranteed by the First and Fourteenth Amendments.

Fourth, this state action again dilutes and frustrates the professional and commercial relationships that intervenors-plaintiffs would enjoy with many Texas optometrists but for the anticompetitive policies which are fostered into official state policy by virtue of the Texas Optometric Association's (and, in turn, the American Optometric Association's) extraordinary majority control of the regulating board. Accordingly, intervenors-plaintiffs are entitled not only to raise their First Amendment issues, but also the substantive and procedural Due Process issues and the Equal Protection issues already raised by Dr. Rogers.

In summary, intervenors-plaintiffs respectfully urge and pray the Court permanently enjoin §2.02, for it is unconstitutional on its face and as applied, under the First and Fourteenth Amendments of the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, intervenors-plaintiffs respectfully pray the Court declare unconstitutional and permanently enjoin the enforcement of §§5.09(a) and (b), 5.10, 5.13(d), 5.15(e), and 2.02 of the Texas Optometry Act, and for such further relief as is just, at law or in equity.

Respectfully submitted.

MEHAFFY, WEBER, KEITH & GONSOULIN

By	s/s	
		Of Counse

1400 San Jacinto Building Beaumont, Texas 77701

#### CERTIFICATE OF SERVICE

I do hereby certify that an exact copy of the above and foregoing Complaint in Intervention has been served upon all interested counsel on this, the 17 day of February, 1976.

	s/s	
-		

### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

#### BEAUMONT DIVISION

DR. N. JAY ROGERS	8
VS.	§ CIVIL ACTION NO. § B-75-277-CA
DR. E. RICHARD	\$
FRIEDMAN, DR. JOHN	§
W. DAVIS, DR. JOHN B.	§
BOWEN, DR. HUGH A.	8
STICKSEL, JR. AND DR.	§
SALVADOR S. MORA	8

#### RENEWED MOTION TO INTERVENE

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COME NOW the Texas Senior Citizens Association, Port Arthur, Texas Chapter, and W. J. Dickinson, individually and as president of said Chapter, and make this their renewed motion for leave to intervene in the captioned civil action. In support hereof, movants would show unto the Court the following:

1.

On or about February 15, 1976, movants filed their original motion to intervene in this action, accompanied by their complaint in intervention. On February 18, 1976, the honorable Chief Judge Fisher of this Court entered an order denying leave to intervene at that time, but without prejudice to the renewal of said motion at a later date. A true copy of said order is attached to this renewed motion.

2.

This motion is made pursuant to F. R. Civ. P. 24 (a)(2) in that your movants claim interest relating to the subject matter of the main action, and said applicants are so situated that this action's disposition may impair or impede -- in a practical sense -- your applicants' ability to protect their interests. Furthermore, your applicants would show that their interests are not adequately protected by existing parties. In the alternative, movants pray the Court grant them leave to intervene as a matter of permission and discretion under F.R. Civ.P.24(b)(2), in that movants' complaint in intervention, on file herein, presents questions of law and fact in common with the main action.

3.

Movants represent unto the Court that allowance of the intervention prayed herein will not operate to complicate or prolong the trial of the merits. The issues sought to be raised by movants can be resolved almost entirely, if not entirely, by reference to the proofs to be offered in the main suit. Furthermore, intervention will not prejudice the defendants or take them by surprise. Further, movants anticipate no need for additional discovery, or for additional delay.

4.

Movants represent unto the Court that the granting of intervention will not complicate the issues, but instead will greatly simplify their presentation and resolution. Furthermore, the granting of intervention will assure that the interests of the public, which lie at the heart of this action, will be represented.

WHEREFORE, PREMISES CONSIDERED, movants Texas Senior Citizens Association, Port

Arthur, Texas Chapter, and W. J. Dickinson, individually and as president of said Chapter, respectfully pray the Court grant this application for intervention, accept the complaint in intervention for docketing and decision with the main suit, and for general relief.

Respectfully submitted.

MEHAFFY, WEBER, KEITH & GONSOULIN Attorneys for Plaintiff

By\_\_\_\_\_Of Counsel

1400 San Jacinto Building Beaumont, Texas 77701

CERTIFICATE OF SERVICE (omitted in printing)

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

DR. N. JAY ROGERS	)(	
VS.	)(	
	)(	
DR. E. RICHARD	)(	CIVIL ACTION NO.
FRIEDMAN, DR. JOHN	)(	B-75-277-CA
W. DAVIS, DR. JOHN B.	)(	
BOWEN, DR. HUGH A.	)(	
STICKSEL, JR., AND DR.	)(	
SALVADOR S. MORA	)(	

## DEFENDANTS' MOTION TO DISMISS AND DEFENDANTS' ANSWER TO COMPLAINT IN INTERVENTION

I

Defendants move that this Court, pursuant to Rule 12, F.R.C.P., dismiss the Complaint in Intervention filed by the Texas Senior Citizens Association, Port Arthur, Texas Chapter and W. J. Dickinson, individually and as President of said chapter for the reasons that Intervenors lack the requisite standing to prosecute this suit.

II.

Subject to any motions to dismiss previously filed, Defendants file this answer in response to the Complaint in Intervention previously filed by the Texas Senior Citizens Association, Port Arthur, Texas Chapter, and W. J. Dickinson, individually and as President of said chapter:

- 1. Defendants deny that this action arises under the constitution of the United States and deny that there has been any threatened deprivation under color of any statute of the State of Texas of any rights, privileges or immunities secured to the Plaintiff or others similarly situated by the Constitution of the United States.
- 2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the first, second and third paragraphs under section II of the complaint in intervention.
- 3. Defendants admit the allegations in the fourth (last) paragraph under section III A.
- 4. Defendants admit the allegations in the first paragraph under section III A.
- 5. Defendants deny the allegations in the second (last) paragraph under section III A.
- 6. Defendants deny all the allegations in subsection B under section III, except for the quoting of the pertinent sections of the statute.
- 7. Defendants deny all the allegations under section IV, except for the quoting of the pertinent section of the statute.
- 8. Defendants deny all the allegations in section V of the complaint.
- 9. Defendants deny all of the allegations under section VI of the complaint.

WHEREFORE, Defendants pray that the Intervenors take nothing by this suit, and that the Court award to the Defendants their costs and for such other relief to which they may be entitled.

Respectfully submitted.

JOHN L. HILL Attorney General of Texas

RICHARD ARNETT Assistant Attorney General

s/s

DOROTHY PRENGLER Assistant Attorney General

P.O. Box 12548, Capitol Station Austin, Texas 78711 512/475-4721

ATTORNEYS FOR DEFENDANTS IN THEIR OFFICIAL CAPACITIES

s/s

JOHN TUCKER

ATTORNEY FOR DEFENDANTS IN THE INDIVIDUAL CAPACITIES

CERTIFICATE OF SERVICE (omitted in printing)

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS REAUMONT DIVISION

DR. N. JAY ROGERS	§	
VS.	§ CIVIL ACT B-75-277-C	
DR. E. RICHARD	§ (THREE J	
FRIEDMAN, DR. JOHN W. DAVIS, DR. JOHN B.	§ COURT)	
BOWEN, DR. HUGH A. STICKSEL, JR., AND DR	§	
SALVADOR S. MORA	§	

## PETITION OF INTERVENTION BY TEXAS OPTOMETRIC ASSOCIATION, INC.

#### TO THE HONORABLE COURT:

Now comes the Texas Optometric Association, Inc. (hereinafter referred to as Intervenor TOA) and files its Petition in Intervention in the above captioned civil action. Intervenor TOA has heretofore filed its motion for leave to amend, stating the reasons therefore and the consent by all parties to the case.

I.

Intervenor TOA is a non-profit Texas Corporation, having a membership of over 500 optometrists licensed in Texas.

II.

This Petition in Intervention is filed pursuant to F. R. Civ. P. 24 (a)(2). All parties of record, by and through their counsel, have agreed to this Intervention, as set forth in Intervenor TOA's Motion for Leave to Intervene.

#### III.

Intervenor TOA supports the position of Defendants on the substantive issues in this case, to-wit, that all statutes being challenged by Plaintiff N. J. Rogers and Intervenor Texas Senior Citizens Association are constitutional, both under the federal and state constitutions.

In this respect, Intervenor TOA adopts verbatim all pleadings, answers, motions and briefs heretofore filed by Defendants in their official capacity by and through their attorney of record, to-wit, the Attorney General of Texas. Such adoption of pleadings shall extend to the Attorney General's pleadings in response to complaints, motions, and briefs filed herein by the Plaintiff, Intervenor Texas Senior Citizens Association, and Intervenor Dickenson.

WHEREFORE PREMISES CONSIDERED, Intervenor Texas Optometric Association, Inc., respectfully prays the Court grant the relief prayed for the Defendants.

Respectfully submitted,

NIEMANN & NIEMANN 1210 American Bank Tower Austin, Texas 78701 (512-474-6901)

By	s/s		
	Larry	Niemann	

## CERTIFICATE OF SERVICE (omitted in printing)

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTIRCT OF TEXAS BEAUMONT DIVISION

#### FILED

U. S. DISTRICT COURT EASTERN DISTRICT OF TEXAS

#### FEB 17 1976

MURRAY L. HARRIS. CLERK

RY

DEPUTY Mildred C. Verret

DR. N. JAY ROGERS

VS.

DR. E. RICHARD FRIEDMAN, ET AL CIVIL ACTION NO. B-75-277-CA

#### GRDER PENDENTE LITE

Section 5.13(d) of the Texas Optometry Act, which prohibits an optometrist from practicing under a name other than the name under which he is licensed, is the subject of a direct constitutional attack in this case.

Plaintiff's office at 907 Congress Avenue, Austin, Texas, becomes subject to the prohibition of §5.13(d) during the pendency of this suit. To avoid the substantial irrevocable expense and disruption attendant to converting such office so as to conform to the mandate of §5.13(d), it is accordingly

ORDERED that the office of Texas State Optical at 907 Congress Avenue, Austin, Texas, is hereby declared exempt from the prohibitions of §5.13(d) and like "trade name" prohibitions of the Texas Optometry Act until 60 days after a final judgment is rendered by this court herein, or pending further order of the Court.

DONE this 16th day of February, 1976.

s/s United States District Judge

APPROVED AS TO FORM AND SUBSTANCE:

s/s ROBERT Q. KEITH ATTORNEY FOR PLAINTIFF

ROBERT L. OLIVER ATTORNEY FOR DEFENDANT

> A TRUE COPY I CERTIFY MURRAY L. HARRIS, CLERK U. S. DISTRICT COURT EASTERN DISTRICT, TEXAS

By: Mildred C. Verret

Civ. Order Book Vol 72 Page 243

#### [Original Proposed Final Judgment Submitted by Plaintiffs]

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

DR. N. JAY ROGERS

V. \$ C.A. NO. B-75-277-CA

DR. E. RICHARD
FRIEDMAN, ET AL \$

#### FINAL JUDGMENT

In accordance with the Memorandum Opinion of the Court dated September 12, 1977 in the above styled and numbered cause, it is the order and judgment of the Court that:

- 1. Dr. E. Richard Friedman, O.D., Dr. John W. Davis, O.D., Dr. John B. Bowen, O.D., Dr. Hugh A. Sticksel, Jr., O.D., and Dr. Salvador S. Mora, O.D., individually and as members of the Texas Optometry Board and their successors in office as such, are hereby restrained and enjoined from enforcing or attempting to enforce Article 4552-5.13(d), Revised Civil Statutes of Texas, as amended, and that portion of Article 4552-5.09(a), Revised Civil Statutes of Texas, as amended, reading, "any statement or advertisement of any price offered or charged by him for any ophthalmic services or materials";
  - 2. All relief not herein specifically granted is denied:

3. This judgment shall be considered for purposes of appeal and otherwise, as a final judgment in this case, and no stay of proceedings pending appeal will be granted by this Court.

OONE this day of _	1977.
	United States Circuit Judge
	United States District Judge
	United States District Judge

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

DR. N. JAY ROGERS, Plaintiff:

W. J. DICKINSON, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter,

Intervenor

VS.

DR. E. RICHARD FRIEDMAN, DR. JOHN B. BOWEN, DR. HUGH A. STICKSEL, JR., DR. JOHN A. DAVIS, DR. SAL MORA.

Defendants;

TEXAS OPTOMETRIC ASSOCIATION, INC.,

Intervenor

NO. B-75-277-CA

## OBJECTIONS TO PLAINTIFF'S PROPOSED FINAL JUDGMENT

#### MOTION FOR JUDGMENT BY DEFENDANTS AND INTERVENOR TOA

NOW COMES Defendants and Intervenor Texas Optometric Association and make their objections to the proposed final judgment heretofore submitted by the attorney for Plaintiff on September 20, 1977; and as grounds for objection would show the following:

- 1. Said proposed judgment by Plaintiff does not clearly set forth the Court's declarations of constitutionality and unconstitutionality regarding Sections 2.02, 5.09(a), 5.13(d), and Section 5.15(e) of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas.
- 2. Said proposed judgment does not limit the scope of unconstitutionality and injunction to the specific portion of Section 5.13(d) of the Texas Optometry Act which the Court has declared unconstitutional.
- 3. Said judgment does not specifically overrule Defendants' motion to dismiss for improper venue, as contained in Defendants' Amended Answer.
- 4. Said proposed judgment of the Plaintiff makes no reference to findings of facts and conclusions of laws as set forth in the memorandum opinion dated September 12, 1977.
- 5. Said proposed judgment does not provide for assessment of Court costs.
- 6. Said proposed judgment does not sufficiently inform the parties and those acting in reliance upon the Court's judgment that they do so subject to final adjudication of the case upon appeal. In this regard the Court's final judgment will likely be misinterpreted by the members of the optometry profession throughout the state if this clarification is not incorporated into the judgment.
- 7. Defendants and Intervenor TOA have acted timely in objecting to Plaintiff's proposed judgment and in submitting their own proposed judgment. The memorandum opinion of the Court, dated September 12, 1977 was mailed to counsel for Defendants and TOA by transmittal of the District Clerk on September 20th.

Counsel for Plaintiff received a copy of the Memorandum Opinion on or about September 20, 1977. Such opinion was received in the mail by the Assistant Attorney General on September 22nd and by the Attorneys for TOA on September 23. The proposed judgment by Plaintiff was received in the mail by the above attorneys on September 23, and on the same date the Assistant Attorney General representing Defendants responded with a letter to the Court objecting to the proposed judgment by Plaintiff. On Monday, September 26th, Attorneys for Defendants in Beaumont likewise delivered an objection letter to the Court.

#### MOTIONS RE JUDGMENT

- 1. Accordingly, Defendants and Intervenor TOA respectfully pray that the proposed final judgment submitted by Plaintiff's counsel on September 20, 1977 not be signed and entered by the Court. In the alternative, if said judgment has been signed and entered, Movants pray that it be set aside.
- 2. Defendants and Intervenor TOA additionally move for judgment according to the attached "FINAL JUDGMENT".

Respectfully submitted,

NIEMANN & NIEMANN 1210 American Bank Tower Austin, Texas 78701

512/474-6901

By\_\_\_\_\_Larry Niemann

Attorneys for Texas Optometric Association, Inc., Intervenor JOHN L. HILL Attorney General of Texas

8/8

DOROTHY PRENGLER Assistant Attorney General

P.O. Box 12548, Capitol Station Austin, Texas 78711

JOHN TUCKER

ORGAIN, BELL & TUCKER Beaumont Savings Building Beaumont, Texas 77701

Attorneys for Defendants, Dr. E. Richard Friedman, Et Al, in their individual capacities

[In the United States District Court for the Eastern District of Texas]

## ORGAIN, BELL & TUCKER ATTORNEYS AT LAW

BEAUMONT SAVINGS BUILDING

#### BEAUMONT, TEXAS

77701

October 3, 1977

RE:Civil Action No. B-75-277-CA
U. S. District Court - Beaumont
D. N. Jay Rogers, Plaintiff; W. J. Dickinson,
Individually and as President of the Texas Senior
Citizens Association, Port Arthur, Texas Chapter,
Intervenor vs. Dr. E. Richard Friedman, Dr. John
B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W.
Davis, Dr. Sal Mora, Defendants; Texas Optometric
Association, Inc., Intervenor

Hon. Murray L. Harris, Clerk United States District Court Eastern District of Texas P.O. Box 231 Beaumont, Texas 77704

Dear Mr. Harris:

Promptly upon receipt of copy of the Memorandum Opinion issued by the Three-Judge Court composed of the Honorable Irving L. Goldberg, Honorable Joe J. Fisher, and Honorable William M. Steger, attorneys for Defendants and Intervenor commenced preparation of a proposed judgment to dispose of the issues in this case

in accordance with the Memorandum Opinion. Before we had an opportunity to submit our proposed judgment, we were informed that the judgment submitted by Plaintiff's attorney, Robert Q. Keith, was in the process of being circulated and signed. Under date of September 26, 1977, in a letter to Judges Goldberg, Fisher, and Steger, we requested that entry of the judgment be withheld until we could submit our objections to Plaintiff's proposed judgment and our suggested judgment, and we are now submitting herewith the following:

- (1) Defendants' and Intervenor's Objections to Plaintiff's Proposed Final Judgment;
- (2) Order Setting Aside the Judgment submitted by attorney Robert Q. Keith (in the event it has already been signed and filed); and
- (3) The judgment submitted by defendants and intervenor.

We strongly feel that the judgment submitted by Plaintiff's attorney does not fully and correctly dispose of all issues and matters decided by the Court as set forth in its Memorandum Opinion.

Accordingly, for the convenience of the judges, I am sending them each a copy of this letter with a copy of the instruments above referred to.

It is respectfully submitted that in order to dispose of all issues and correctly reflect the Court's action as set forth in its Memorandum Opinion, the final judgment as proposed by Defendants and Intervenor, Texas Optometric Association, Inc., is the correct on to be entered.

If there is any question as to this matter, then Defendants and Intervenor respectfully request they be accorded a hearing before any judgment becomes final. Very truly yours.

s/s John G. Tucker

JGT/co Enclosures

- cc: Hon. Irving J. Goldberg
  United States Circuit Judge
  Circuit Court of Appeals Fifth Circuit
  600 Camp Street
  New Orleans, Louisiana 70130
- cc: Hon. Joe J. Fisher
  United States District Judge
  Eastern District of Texas
  P.O. Box 231
  Beaumont, Texas 77704
- cc: Hon. William M. Steger United States District Judge Eastern District of Texas P.O. Box 231 Beaumont, Texas 77704
- cc: Hon. Robert Q. Keith Mehaffy, Weber, Keith & Gonsoulin 1400 San Jacinto Building Beaumont, Texas 77701
- ee: Ms. Dorothy Prengler Assistant Attorney General P.O. Box 12548, Capitol Station Austin, Texas 78711
- cc: Mr. Larry Niemann Niemann & Niemann 1210 American Bank Tower Austin, Texas 78701

[In the United States District Court For the Eastern District of Texas]

## ORGAIN, BELL & TUCKER ATTORNEYS AT LAW

BEAUMONT SAVINGS BUILDING

BEAUMONT, TEXAS

77701

October 11, 1977

RE:Civil Action No. B-75-277-CA
U. S. District Court - Beaumont
Dr. N. Jay Rogers, Plaintiff; W. J. Dickinson,
Individually and as President of the Texas Senior
Citizens Association, Port Arthur, Texas Chapter,
Intervenor vs. Dr. E. Richard Friedman, Dr. John
B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W.
Davis, Dr. Sal Mora, Defendants; Texas Optometric
Association, Inc., Intervenor

Hon. William M. Steger United States District Judge Eastern District of Texas P.O. Box 231 Beaumont, Texas 77704

Dear Judge Steger:

Attorney Robert Keith has given me a draft of a new judgment which I understand will be submitted to you and other members of the Court. The defendants, Richard E. Friedman, et al, as well as the intervenor, Texas Optometric Association, Inc., have heretofore submitted a proposed judgment as well as objections to the judgment originally proposed by plaintiff.

The defendants and intervenor, Texas Optometric Association, Inc., strenuously object to certain provisions in the judgment now proposed by plaintiff, particularly the following:

- (1) In Paragraph 2 of the plaintiff's present proposed judgment, Section 5.11 of the Texas Optometry Act of Article 4552 is declared unconstitutional. We object to the entry of a judgment declaring this Section of the Act unconstitutional because:
  - (a) Section 5.11 of the Texas Optometry Act was not mentioned in plaintiff's complaint;
  - (b) These defendants and intervenor were not heard with respect to any complaint pertaining to Section 5.11 of the Texas Optometry Act; and
  - (c) The Court's Memorandum Opinion does not mention Section 5.11 of the Texas Optometry Act of Article 4552, and there is nothing in the Memorandum Opinion indicating the intention of the Court to declare unconstitutional this Section of the Act which was not put in issue in this case.

By way of summary, defendants and intervenor, Texas Optometric Association, Inc., submit that it is clearly improper to now enter a judgment declaring a section of the Texas Optometry Act unconstitutional which has not heretofore been mentioned in this case.

(2) Defendants' and intervenor's proposed judgment in Paragraph 2, proceeding strictly in accord with the pleadings and the Memorandum Opinion, provided that Section 5.13(d) of the Texas Optometry Act of Article 4552 was declared unconstitutional. This is the same section of the Act referred to in the plaintiff's original proposed judgment, and it is submitted that the declaration that Section 5.13(d) of Article 4552 is

unconstitutional is the only appropriate provision to be included in the judgment and that the last three lines in Paragraph 3 of plaintiff's proposed judgment, reading as follows:

"Or any other provision of the Texas Optometry Act which prohibits in any way the practice of Optometry under a trade name,"

go beyond the scope of the pleadings and the Courts' Opinion and should not be included in the judgment.

Our objection is plaintiff only complained of certain enumerated sections of the Texas Optometry Act and that the judgment should be confined to a decision of whether or not these particular sections, which were the only ones actually passed on by the Court, were unconstitutional and that it is improper to enlarge on the pleadings and the Courts' Opinion so as to attempt to include other sections of the Texas Optometry Act which were not complained of, which were not in issue, and which were not passed on by the Court.

(3) Defendants and intervenor, Texas Optometric Association, Inc., object to the proposed Paragraph 5 of the judgment which instead of declaring Section 2.02 of the Texas Optometry Act, Article 4552, as being constitutional pursuant to the Court's Memorandum Opinion, proposes a negative finding to the effect that the Court did not really determine the issue. In other words, the issue before the Court was whether Section 2.02 of the Texas Optometry Act, Article 4552, was constitutional or not. In the Memorandum Opinion, the Court determined that it was constitutional, and we feel that the judgment should follow the pleadings and the Courts' Memorandum Opinion, and declare that Section 2.02 is constitutional and not qualify the Courts' decision by the statement that it is not declared unconstitutional per se.

By way of summary, we submit that the judgment proposed by defendants and intervenor, Texas Optometric Association, Inc., is the correct judgment to be entered since it follows the pleadings and the Memorandum Opinion and directly disposes of the issues in exactly the manner set forth in the Court's Memorandum Opinion.

In view of the fact that I understand that the judgment may be circulated to all judges on the panel, I am taking the liberty of sending a copy of this letter to each and am filing copies with the Clerk.

Defendants and intervenor do not wish to unduly burden the Court, but we feel it is important that the judgment should follow the pleadings and issues determined by the Court set forth in the Memorandum Opinion.

If there is any question as to this matter, we respectfully request the right to be heard before a final judgment is entered.

Very truly yours,

s/s John G. Tucker

JGT/co

ce: Hon. Murray L. Harris, Clerk United States District Court Eastern District of Texas P.O. Box 231 Beaumont, Texas 77704

cc: Hon. Irving J. Goldberg
United States Circuit Judge
Circuit Court of Appeals - Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

- cc: Hon. Joe J. Fisher
  United States District Judge
  Eastern District of Texas
  P.O. Box 231
  Beaumont, Texas 77704
- cc: Hon. Robert Q. Keith Mehaffy, Weber, Keith & Gonsoulin 1400 San Jacinto Building Beaumont, Texas 77701
- cc: Ms. Dorothy Prengler
  Assistant Attorney General
  P.O. Box 12548, Capitol Station
  Austin, Texas 78711
- cc: Mr. Larry Niemann Niemann & Niemann 1210 American Bank Tower Austin, Texas 78701

# IN THE UNITED STATES DISTRICT COURT IN AND FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

DR. N. JAY ROGERS	§
VS.	§ CIVIL ACTION NO.
DR. E. RICHARD	§ B-75-277-CA
FRIEDMAN, DR. PHILLIP LEWIS, DR. JOHN B.	§
BOWEN, DR. HUGH A.	§
STICKSEL, JR., AND DR.	§

#### MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANTS AND INTERVENOR'S OBJECTIONS TO PLAINTIFF'S PROPOSED JUDGMENT AND IN SUPPORT OF JUDGMENT SUBMITTED BY DEFENDANTS AND INTERVENOR

Defendants and Intervenor have submitted a proposed judgment directly and specifically following the pleadings and the Court's Memorandum Opinion and disposing of the issues in exactly the manner set forth by the Court in its Opinion.

Objection is made to Paragraph 2 of plaintiff's proposed judgment which declares Section 5.11 of the Texas Optometry Act unconstitutional because this section of the Act has not been mentioned in any of the pleadings, it was not referred to in the Court's Memorandum Opinion, and defendants and intervenor were not accorded a hearing with respect to any complaint or contention that Section 5.11 of the Texas Optometry Act was unconstitutional as applied to the plaintiff.

Defendants and Intervenor, in Paragraph 2 of their proposed judgment, set forth in accordance with the pleadings and the Memorandum Opinion, the holding of the Court that Section 5.13(d) of the Texas Optometry Act of Article 4552 was unconstitutional. It is submitted that this is the proper judgment to be entered and not one declaring some other Section of the Act unconstitutional.

In Paragraph 3 of plaintiff's proposed judgment, plaintiff again seeks to enlarge upon the pleadings and the scope of the Court's Memorandum Opinion by declaring unconstitutional "any other provision of the Texas Optometry Act which prohibits in any way the practice of optometry under a trade name". The pleadings and the Court's Opinion did not refer to other provisions of the act. It is submitted that this general condemnation of unspecified provisions of the Texas Optometry Act and an injunction against the enforcement thereof is improper.

Attached hereto for the Court's convenience is a copy of Pgs. 294 through 308 of 16 Am. Jur. 2d "Constitutional Law". The numerous cases there referred to set forth the rules which have invariably been followed with respect judicial restraint in exercising the power to declare a statute unconstitutional. (1) The court will not assume to pass on constitutional questions not pled or brought directly into issue in the case; (2) The courts will not consider or determine hypothetical questions or anticipate constitutional issues, which may arise, but are not at issue in the case.

Defendant and Intervenor also respectfully refer the Court to the following cases:

(1) Toyosaburo Korematsu vs. United States, 65 S.Ct. 193, 3824 U.S. 241, wherein the Court held as follows in

refusing to pass on constitutional questions not raised by the pleadings:

"Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us."

(2) In Solesbee v. Balkcom, 70 S.Ct. 457, 339 U.S. 9, the Supreme Court stated:

"In accordance with established policy we shall not go beyond the constitutional issues necessarily raised by this record."

The Court then proceeded to rationalize their holding on the ground that they would not measure the statute by some possible future application and limited their holding to the specific statutes and application thereof directly involved in the case.

(3) The same rule was announced in *United States v. Appalachian Power Co.*, 61 S.Ct. 291, 311 U.S. 377, where the primary question had to do with the scope of the Federal Commerce Power in relation to conditions in licenses required by the Federal Power Commission for the construction of hydro-electric dams on navigable rivers. The Court refusal to enlarge upon the scope of

the holding with respect to the constitutionality of the license, stating:

"We shall pass upon the validity of only those provisions of the license called to our attention by respondent as being unrelated to the purposes of navigation."

In light of the foregoing, Defendants and Intervenor also object to Paragraph 5 of plaintiff's proposed judgment, which instead of declaring Section 2.02 of the Texas Optometry Act, Article 4552, as being constitutional pursuant to the Court's Memorandum Opinion, proposes a negative finding to the effect that the Court really did not determine the issues at all. The question before the Court was whether this section of the Act was constitutional or not in the context of the attack being made on it. The Court upheld the constitutionality of this section of the Act and overruled plaintiff's contention that it was unconstitutional as applied to the facts before the Court. Accordingly, it is the position of Defendants and Intervenor that the judgment should follow the pleadings and the Court's Memorandum Opinion and specifically declare that Section 2.02 of the Act is constitutional and not attempt to qualify the Court's decision and thus embark on the forbidden grounds of considering and determining hypothetical or abstract questions which were not before the Court.

It is respectfully submitted that Defendants' and Intervenor's proposed judgment correctly disposes of the issues in the case in line with the Court's Memorandum Opinion.

Respectfully submitted,

s/s

John G. Tucker ORGAIN, BELL & TUCKER Beaumont Savings Building Beaumont, Texas 77701

ATTORNEYS FOR INTERVENOR, TEXAS OPTOMETRIC ASSOCIATION, INC.

### CERTIFICATE OF SERVICE (omitted in printing)

[In the United States District Court for the Eastern District of Texas]

#### THE ATTORNEY GENERAL OF TEXAS

October 25, 1977

Hon. William M. Steger United States District Judge Eastern District of Texas P.O. Box 231 Beaumont, Texas 77704

Re: Dr. N. Jay Rogers v. Friedman, et al, Civil Action No. B-75-277-Ca

Dear Judge Steger:

Subsequent to the conference held on Thursday, October 20th in your chambers, there was a meeting of the Texas Optometry Board. I informed the Board members of the allegations made by Mr. Keith in his brief regarding alleged threats made by Board members to Dr. Rogers to the effect that the Board would attempt to circumvent the court's Memorandum Opinion in this case.

Needless to say, the Board members vehemently denied any such threats and were quite upset that these representations had been made to the Court. The Board members requested that I inform you that if you are so inclined, they would like the opportunity to refute these allegations by means of a hearing or affidavits. I am relaying this information to you in order to let you know that the Board in no way intends to circumvent any ruling of the Court.

Thank you for your cooperation.

Very truly yours.

Dorothy Prengler Assistant Attorney General

#### DP:ch

Mr. Robert Q. Keith
Mehaffy, Weber, Keith & Gonsoulin
1400 San Jacinto Building
Beaumont, Texas 77701

Mr. Murray L. Harris
U.S. District Clerk
Eastern District of Texas
P.O. Box 231
Beaumont, Texas 77704

bxe: Dr. N. Jay Rogers
Dr. Hugh A. Sticksel
Dr. John B. Bowen
Dr. E. Richard Friedman
Dr. John W. Davis
Dr. Salvador S. Mora
Ms. Lois Ewald
Mr. Joe R. Greenhill, Jr.

[Filed in the United States District Court for the Eastern District of Texas]

[McGUIRE CONTRACT]

STATE OF TEXAS

COUNTY OF JEFFERSON

KNOW ALL MEN BY THESE PRESENTS:

That Drs. S. J. Rogers and N. Jay Rogers, duly registered optometrists, doing business under the trade name of Texas State Optical, hereinafter referred to as FIRST PARTIES, and Dr. Richard P. McGuire, hereinafter referred to as SECOND PARTY, have entered into this Memorandum of Contract consisting of three (3) separate phases of agreement, to-wit:

- A. pp. 2 and 3 deleted
- B. Agreement for Joint Ownership of office by and between First Parties and Second Party.
- C. Sale of One Hundred (100%) per centum of First Parties interest in office.

DEFINITIONS APPLICABLE TO ALL PHASES OF THIS CONTRACT

DEFINITION #1: WHEREVER THE WORDS
TEXAS STATE OPTICAL are
used, it is understood that such trade
name encompasses the use of the
words, letters, initials, symbols, or
other designations of Texas State
Optical, Texas Optical, State
Optical, T.S.O., and other variations
and abbreviations of same.

- DEFINITION #2: All phases of this contract relate to the No. 37 Haltom Office belonging to First Parties, operated under the name Texas State Optical, located in Fort Worth, Tarrant County, Texas hereinafter called "the office", and no other office or offices of First Parties are involved in any phase of this contract.
- DEFINITION #3: First Parties are the owners of Texas State Optical, and have offices in many cities in Texas, and conduct a general optometry practice and optical dispensing business consisting of the examining of eyes and fitting and selling of glasses and contact lenses to the public, and they have a considerable amount of money invested in said businesses.
- DEFINITION #4: Second Party is duly licensed to practice optometry in the State of Texas, and is presently employed by First Parties, and he desires to continue to such employment by First Parties, and First Parties desire his services.
- DEFINITION #5: Wherever notice is required by the terms of this contract, such notice shall be in writing and sent by Registered Mail to the following addresses: For the First Parties, Post Office Box 1310, Beaumont, Texas 77704; and for notice to the Second Party, 4019 E. Belknap, Fort Worth, Texas 76111.

DEFINITION #6: It is agreed by First Parties and Second Party that the place of payment for any monies payable to First Parties under this contract is to be Beaumont, Jefferson County, Texas.

### B. OPERATION OF NO. 37 HALTOM OFFICE AS PARTNERSHIP

Effective the 1st day of March, 1970, the No. 37 Haltom Office will be operated as a partnership by and between First Parties and Second Party under the terms and conditions as set forth herein.

- 1. The Office will be operated as a partnership comprised of First Parties and Second Party, with First Parties being regarded as a single partner and Second Party being regarded as the other partner. The term of this partnership shall be for a period of three (3) years, commencing as of the date set forth above and continuing through February 28, 1973, unless sooner terminated under the provisions contained in this Agreement.
- 2. The Parties hereto acknowledge that the subject office is an existing successful operation, and as such is of considerable present value. The partnership shall be capitalized solely by First Parties and no capital contribution shall be required of Second Party. Second Party shall be entitled to participate in any profits of the partnership, however, any and all losses of the partnership operation shall be sustained solely by First Parties as set forth hereinafter. It is acknowledged that the consideration due First Parties from Second Party in payment for the rights and interests herein granted shall be deferred and abated until such time as set forth in Section C of this Contract infra.

3. During the existence of this partnership, the profits and the losses of the partnership operation shall be shared by the partners on the following basis:

First Parties Fifty

Fifty (50%) per cent

Second Party

Fifty (50%) per cent

Provided, however, that if the loss in any fiscal year shall be such that Second Party's prorata share would reduce Second Party's capital account to a negative amount (deficit amount), then only so much of Second Party's prorata share of the loss as would reduce his capital account to exactly zero (and not to a negative or deficit amount) shall be attributed to Second Party and the balance of the loss in that fiscal year shall be attributed to First Parties and shall become a charge against First Parties' capital account, the First Parties shall have no right or reimbursement as against Second Party or the partnership by virtue of such disproportionate sharing of losses.

4. It is recognized that Second Party is an optometrist, licensed under the laws of the State of Texas, and that First Parties have entered into this agreement upon the predicate that Second Party will actively engage in the practice of optometry on a full time basis at the office occupied by the partnership, and will actively act as manager of said office during the term of this partnership agreement. In this connection, Second Party covenants that he will devote full time to the practice of optometry and to the management of the office of the partnership, and that during the term of this agreement, he will not engage in any other occupation, business or profession which would in any way interfere with his proper management or operation of the office. Second Party further covenants that he will be present in the office of the partnership on each working day (except a two (2) week annual vacation,

illness and emergencies), and that he will diligently perform his duties and conscientiously practice his profession at all times. As compensation for the aforesaid services, Second Party shall be paid a salary of One Hundred Seventy-five (\$175.00) Dollars per week, including a two (2) week vacation period, which salary shall be deemed an expenses of the partnership and not as a withdrawal of capital by Second Party. However, this salary arrangement is predicated on the assumption that Second Party shall personally be present at the office at all times during each working day as aforesaid, except during the two (2) weeks annual vacation, and also that Second Party will waive any annual vacation period if substitute personnel are not available, and in consideration for such waiver of vacation, shall be paid extra and in addition to his regular salary, an amount equal to two (2) weeks' salary. Second Party shall be allowed to draw monthly the amount of Seven Hundred and No/100 Dollars (\$700.00) against Second Party's share of the partnership profits.

5. It is expressly agreed that rules and regulations for the supervision and management of the partnership office and all policy matters relating to the office, shall be fixed and determined by First Parties in accordance with general policies prevailing in other Texas State Optical offices. It is agreed that the partnership shall retain the firm of Rogers Bros., Beaumont, Texas, for advisory and supervisory services, including among other services, accounting, advertising programming, and window and display programming, in consideration for which Rogers Bros. will be paid as compensation an amount equal to four (4%) percent of the net cash of the office, such compensation to be paid monthly.

First Parties shall determine and fix the general rules, regulations and policies for the management of the office, in accordance with the good business and optometric practices and in accordance with the general policies prevailing in other comparable Texas State Optical Offices. This shall include, not to the exclusion of any other, the prevailing policies covering and concerning the examination of patients without regard to age, physical infirmity, nationality, race, creed, etc.; progress examinations and reexaminations; and all other applicable policies including the care and continued care of contact lens patients, transfer patients, and any other persons who have previously been patients of some other TSO Office, partnership TSO Office, or associate TSO Office. This shall include the right to determine whether Second Party shall be required to become a member of the Texas State Optical Association as more particularly set forth in Paragraph 18. Pages 12 and 13. Section C of this contract.

- 6. The parties hereto expressly agree that the office shall purchase all optical material, of every nature, including but not limited to frames, lenses, contact lenses, all prescription work, opthalmic supplies, refracting equipment, and other optical supplies, from Rogers Bros., Beaumont, Texas, and that all optical laboratory work for the partnership created hereby shall be done by Rogers Bros., provided the charges made therefor by Rogers Bros. do not exceed the regular charges made by reputable optical laboratories for comparable quality of materials and workmanship.
- 7. First Parties are the owners of the trade name Texas State Optical (as defined), and First Parties hereby agree to grant the partnership the revocable license to use, during the term of the partnership and not thereafter, the trade name Texas State Optical and/or Texas State Optical of (other variations). It is expressly understood and agreed that the partnership has no right, title or interest in and to any of the

aforesaid trade names, but merely has a license to use the trade names during the term hereof. Upon the termination of this partnership for any reason, said license shall cease and terminate. It is further expressly understood and agreed that upon the termination of this partnership, Second Party shall have no right to the use of any of said trade names nor shall Second Party, at any time, allow any person, firm or corporation to use any of said trade names. Second Party further agrees that in the event of the termination of this partnership, Second Party will not refer to any advertising in any manner or at any time whatsoever to his former association with Texas State Optical or First Parties.

- 8. Except as otherwise specifically provided in the Agreement, this partnership may be terminated by First Parties or Second Party prior to the date set forth in Paragraph 1 only as set forth below:
  - a. First Parties shall have the right to terminate this partnership in the event of (1) misconduct by Second Party; or (2) breach by Second Party of any of the covenants herein set out, then upon such termination, First Parties shall have the option to purchase from Second Party, Second Party's ownership interest in the partnership at a price equal to the amount of Second Party's partnership capital account. This option may be exercised by First Parties at any time within thirty (30) days after First Parties shall have given Second Party notice of such termination. Without limitation on generality of term "misconduct", it is agreed that said term shall include the following:
    - (1) Conviction of a misdemeanor involving moral turpitude or of any felony;
    - (2) Consumption of alcoholic beverage or liquor at any time during the working hours of the

partnership office, or the use of alcoholic beverages or liquors at any other time to the extent that same impairs the ability to properly perform managerial and professional duties;

(3) Addiction to or use of habit forming drugs:

(4) Suspension, cancellation or revocation or termination of optometric license;

- (5) Consistent and willful refusal to follow management policies and procedures after receipt of written notice setting forth such deficiencies.
- b. Second Party shall have the right to terminate this partnership at any time by giving written notice to the First Parties of his election to so terminate, whereupon First Parties shall have the option to purchase Second Party's interest in the partnership at a price equal to the then amount of Second Party's partnership capital account. First Parties shall have a period of fifteen (15) days after receipt of such notice to exercise this option. In the event that First Parties fail or neglect to exercise their option, then the partnership shall be terminated and First Parties and Second Party shall hold the assets of the partnership as Tenants in Common.
- 9. First Parties and Second Party hereby agree that in the event of the demise of Second Party, First Parties shall purchase the ownership interest of Second Party in the partnership formed hereby and shall pay therefor to the estate or legal representative of Second Party, the amount of Second Party's death. It is further agreed that in the event of the bankruptcy of Second Party, First Parties shall purchase Second Party's partnership interest for a sum equal to the amount of Second Party's capital account in the partnership as of the effective date of Second Party's bankruptcy.

- 10. In the event of the death of either S. J. or N. Jay Rogers, the partnership formed hereby shall not be dissolved but shall be continued as between the survivor of the two and the remaining partner or partners. In the event of the death of both S. J. and N. Jay Rogers, their collective interest in the partnership shall be conveyed in accordance with Paragraph 3 of Section C, infra, effective as of the first day of the next month following the date of demise of S. J. and N. Jay Rogers or the survivor of the two, as the case may be.
- 11. Other than set forth herein, the sale or disposition of any ownership interest shall be made only with the consent and agreement of all parties.
- 12. In the event of the sale of First Parties interest in the partnership to Second Party, First Parties agree to refrain from competing with Second Party in accordance with the terms and provisions contained in this instrument, Part C, paragraph 10, infra. In the event of termination of this partnership by reason of First Parties acquiring the partnership interest of Second Party, then Second Party covenants and agrees that he will not actively engage in the practice of optometry within a three (3) mile radius of the location of the partnership office for a period of ten (10) years immediately following the disposition of his partnership interest to First Parties.
  - C. SALE OF ONE HUNDRED (100%) PERCENT OF FIRST PARTIES" INTEREST IN THE OFFICE

First Parties and Second Party do hereby agree that effective as of *March 1, 1973* (or sooner as hereinbelow provided), First Parties shall sell their remaining ownership interest in the office to Second Party, and Second Party agrees to purchase First Parties

remaining ownership interest in the office under the following terms and conditions:

- 1. The office shall consist of the records, equipment, furniture, fixtures, signs and all improvements, but shall not include stock inventory, accounts receivable, nor the bank account developed through deposits from office receipts prior to the effective date of transfer.
- 2. As consideration for such conveyance, Second Party shall pay First Parties ten (10%) percent of the net cash of the office for a period of ten (10) years commencing March 1, 1973 and extending through February 28, 1983. The period for which such payments are payable being hereinafter referred to as the "payment period". For the purposes of this instrument net cash shall be defined as the total cash received by the office less refunds and/or bad checks. The foregoing percentage payments shall be paid monthly, for each and every month during the "payment period" on or before the tenth (10th) day of the month next following. Such payment shall be equal to ten (10) percent of the net cash of the office for the month immediately preceding. Example: In the event the net cash for the month of January, 1974, is Ten Thousand (\$10,000.00) Dollars, then One Thousand (\$1,000.00) Dollars shall be due and payable by Second Party to First Parties on or before February 10, 1974. Further, of the monthly payments made, as provided in this paragraph, an amount equal to four (4%) percent per annum simple interest rate shall be treated, construed and applied as interest and the remaining balance of such payment shall be treated, construed and applied as principal. The foregoing stated interest treatment is being agreed upon in accordance with the provisions of Section 483 of the Internal Revenue Code and regulations promulgated pursuant thereto and is subject to said regulations, official opinions, administrative rulings and/or judicial

determinations. If any such payments are not made when due (i.e., on or before the tenth (10th) day of the month next following), and if such default shall continue until the twenty-fifth (25th) day of such month, then and in that event, there shall be added to the sum then payable, a late handling charge in the amount of ten (10%) percent of the amount then due. It is further provided that in the event the Second Party does not make the required monthly payments as due for three (3) successive monthly periods, then and in that event, the contract shall automatically be terminated and all payments hereunder shall be considered as rents paid on the use of the office and all rights of ownership shall revert to First Parties. It is further agreed that in the event such reversion takes place, that the bank account, the accounts receivable, and the stock inventory shall not revert to the First Parties, but shall remain the property of Second Party subject to any other claims outstanding against such assets. Second Party agrees to execute all necessary instruments to effectuate such reversion.

- 3. First Parties may, at their option, accelerate the commencement date of the foregoing purchase arrangement from March 1, 1973 to the first day of any month falling between the date of execution of this instrument and March 1, 1973. First Parties may exercise such option by giving to Second Party, thirty (30) days notice of their election to so accelerate. In such event, the "payment period" shall commence upon the effective date of purchase (as accelerated) and continue through February 28, 1983. The monthly percentage payments, as set forth in the preceding paragraph, shall be payable for each and every month during such "payment period".
- 4. Second Party agrees to use and keep daily sales report sheets, or records, similar to those used by First

Parties, and a copy shall be sent to First Parties daily as such records are made, and to make such information available to First Parties throughout the entire term of sales contract, and for so long thereafter as the name Texas State Optical (as defined) is used in Second Party's operation. Second Party agrees that First Parties shall have full access to the sales information, records, and/or books or receipts of the office in order to insure First Parties adequate proof of accuracy of all records and/or books or receipts. It is further agreed, from time to time, all records, reports, receipts, books, accounts and business operations may be audited by First Parties. In the event there are discrepancies Second Party shall pay for cost incurred.

Second Party shall have said books audited annually by a Certified Public Accountant in good standing under the provisions of the Accountancy Law of the State of Texas, and said Certified Public Accountant shall render an "Opinion" report, based on his examination and a copy shall be transmitted to First Parties within ninety (90) days after the close of each fiscal year. The provisions in this paragraph shall be applicable throughout the entire term of this sales contract, and for so long thereafter as the name Texas State Optical is used in Second Party's operation.

5. As a part of the consideration hereof, Second Party hereby agrees to purchase all optical material, of every nature, including but not limited to frames, lenses, contact lenses, all prescription work, opthalmic supplies, refracting equipment, and other optical supplies from Rogers Bros. Laboratory for so long as Rogers Bros. or their successors in interest desire to do the laboratory work. Second Party agrees to pay for all purchases and/or laboratory work from Rogers Bros. Laboratory on a monthly basis by the tenth (10th) day of the following month. In the event any such payments are

not made when due and such default continued until the twentieth (20th) day of the month due, then and in that event Rogers Bros. Laboratory may add ten (10%) percent of the outstanding balance to such balance as a late payment charge to cover handling and collection charges on such balance. All charges for laboratory work done by Rogers Bros. will be as low or lower than the regular charges made by reputable optical laboratories for comparable quality of materials and workmanship. Shipping charges to be paid for by Second Party, as is the prevailing policy with other similar offices.

6. As long as the words or designation T.S.O. are used in any manner whatsoever, or any payments are owing under the terms of Paragraph 2 above, Second Party agrees to operate said office in accordance with the general policies and business practices as used by First Parties in their other Texas offices. Such practices shall specifically include, without limitation, hours of operation, personnel procedures, the pricing of services and/or products by First Parties. This shall include, not to the exclusion of any other, the prevailing policies covering and concerning the examination of patients without regard to age, physical infirmity, nationality, race, creed, etc.; progress examinations and reexaminations; and all other applicable policies including the care and continued care of contact lens patients, transfer patients, and any other persons who have previously been patients of some other TSO Office. partnership TSO Office, or associate TSO Office.

First Parties covenant that the policies and procedures maintained and/or instituted by them for the office shall be in accordance with good business and optometric practices and shall be consistent with the policies and procedures practiced in other comparable Texas State Optical offices. Any deviation by Second

Party from such practices or policies shall be promptly called to Second Party's attention as soon as practicable after discovery of such deviation by First Parties. Notice of such deviation shall be in written form and shall be sent to Second Party by Registered or Certified Mail, setting out in specific detail the deviation to which objection is taken. In the event such deviation continues for more than five (5) days after receipt of such notice, Second Party hereby agrees to pay First Parties Fifty (\$50.00) Dollars per day for each and every day following the five (5) day notice that such deviation continues.

It is specifically agreed and understood by and between the First Parties and the Second Party that the provisions of these paragraphs specifically shall apply to Second Party's operation so long as the name Texas State Optical (as defined) is used in Second Party's operation. These provisions will apply even though all payments required under this contract have been completed. In the event all payments under this agreement have been completed and such deviations continue after such due notice, Second Party shall immediately stop using the name Texas State Optical or other similar designation in any manner and shall remove any such descriptive name or symbols from or about his office.

7. Second Party hereby acknowledges the necessity of coordinating Second Party's Comprehensive General Liability and Professional Liability Insurance Coverage Program with that of First Parties. Second Party hereby agrees to maintain, at his own expense, adequate Comprehensive General Liability and Professional Liability Insurance of a form approved by First Parties and carried a reputable insurance company selected by First Parties. The limits of such insurance coverage shall be determined by First Parties in accordance with

the amounts carried by optometrists in other offices of First Parties, which limits in no event shall be less than; For bodily injury liability, One Hundred Thousand (\$100,000.00) Dollars for each person and Three Hundred Thousand (\$300,000.00) Dollars for each occurrence and; for property damage liability, Twenty-five Thousand (\$25,000.00) Dollars.

Second Party further agrees that they will conduct the handling of any professional liability claim in accordance with the policies and procedures set forth by First Parties. The Second Party further agrees to maintain, at all times, adequate Workmen's Compensation and Employer's Liability Insurance and Casualty Insurance (fire, extended coverage, vandalism and malicious mischief) on the fixtures, furniture and leasehold improvements in an amount of not less than Twenty Thousand (\$20,000.00) Dollars. Copies of such policies of insurance shall be furnished to First Parties and all such insurance shall be maintained in force throughout the term of this contract. First Parties shall be named as Mortgagees, as their interests may appear, under the loss payable provisions of the casualty policy maintained hereunder

For ease in purchasing, maintaining, handling and claim administration, First Parties may require the Second Party place his

- a. Comprehensive General Liability Insurance
- b. Workmen's Compensation Insurance
- c. Professional Liability (malpractice) Insurance
- d. Contents Fire and Extended Coverage Insurance
- e. Hospitalization Insurance
- f. Other casualty coverage as may be agreed upon

through a broker designated by First Parties (and consequently through one insurance company). Both

parties recognize the advantages and advisability of obtaining uniform coverage and premiums in the placing of this insurance.

- 8. Second Party agrees to continue to use the prescription form maintained by First Parties (including any changes made during the term of this contract) and that no other form shall be substituted therefor. Any other general accounting forms instituted in the offices of the First Parties shall also be applied with due diligence to the operation of the office by Second Party. Second Party further agrees to comply with prevailing policies relating to honoring requests by patients, customers, or other offices for transfers of records, or copies of such records.
- 9. First Parties agree that for so long as Second Party is not in default as to the covenants and conditions of this contract, First Parties will not open a like or similar optometric business for the practice of optometry nor grant any Third Party the right to open a like or similar optometric business under the name T.S.O. (as defined) for the practice of optometry, within that certain area described in Exhibit "A" attached hereto and hereinafter referred to as the "excluded area". Second Party agrees that in the event he leaves the employ of, or association with, First Parties for any reason, he will not engage in or operate any optometric office or business, directly or indirectly, within the said "excluded area" for a period of five (5) years from the date that this contract, or association is terminated, for whatever cause it may be terminated. Second Party further agrees that in the event he leaves the employ of, or association with, First Parties for any reason, he will not refer in any advertsing in any manner or at any time whatsoever, to his former association with Texas State Optical or First Parties.

- 10. First Parties agree that for so long as Second Party is not in default as to the convenants and conditions of this contract, his ownership of the office shall include the right to use the trade name Texas State Optical (as defined) within and only within, the "excluded area" as set forth in Exhibit "A". It is acknowledged, however, that there may exist from time to time, sales contracts for other offices within close proximity to the boundaries of the "excluded area" and that the protected area of such offices may coincide with part of the protected area of the No. 37 Haltom office. In such event, Second Party shall not (nor shall the purchaser of such other office) have the right to open or operate an office within that part of the "excluded area" that also comprises part of the protected area of another office. Second Party hereby agrees to first obtain the written approval of the First Parties prior to the location or relocation of any optometric or optical office within the "excluded area" described in Exhibit "A" attached hereto, which approval First Parties agree not to unreasonably withhold.
- 11. Second Party agrees that as the owner of the office, he will continue to operate said office in an efficient and businesslike manner, in order to promote the greatest success of the office. Second Party covenants that he will devote full time to the practice of optometry and to the management of the office, which is the subject matter of this contract, and that during the entire purchase term (payout period) of this agreement, he will not engage in any other occupation, business or profession which would in any way interfere with his proper management or operation of the office.
- 12. So long as such programs are available to other offices of First Parties, Second Party agrees that his office will remain a member of the Rogers Pension Plan, and of various benefit programs such as hospitalization

insurance and disability insurance. These items are set out as illustrations of this provision and not as limitations thereof.

- 13. First Parties and Second Party agree that if, by reason of legislative action, court decisions or administrative rulings, the manner or style of operation of said office and business is required to change, that both parties will conduct the business and practices and operation of said office within the laws governing the practice of optometry in Texas at all times. For example: Should the prohibition of certain forms of advertising in Texas become law, both parties hereby agree to abide at all times by the laws governing the practice of optometry and the conduct of operating an optometry office and business in Texas.
- 14. Second Party agrees that during the payment period of this contract, he will not, without prior written approval of First Parties, sell, assign, convey, transfer, lease or sub-lease all or any part of the office being purchased in whole or in part under this contract, with the exception of conveyances in connection with the normal replacement of physical assets because of wear and tear or obsolescence. Second Party further agrees that in the event a sale, assignment, conveyance, transfer, lease or sub-lease is permissible under the terms of this contract and is made, that such contractural arrangement shall be subject to all of the then applicable provisions of this contract and that the purchaser, lessee, assignee, etc., will specifically accept the provisions of this contract.

In the event of a bona fide offer in writing by a Third Party to purchase the office, and the Second Party desires to sell on the basis of such bona fide offer, Second Party agrees to first offer the First Parties the same opportunity to purchase on the same terms. In the event of a refusal to so purchase by First Parties, Second Party must then accept such bona fide offer by the Third Party.

In the event any such bona fide offer is made by a Third Party, communicated to First Parties, and refused by them, Second Party must then proceed to make sure sale to the Third Party. In the event such sale is not made to the Third Party, Second Party agrees to pay to First Parties an amount equal to ten (10%) percent of the offered price to cover First Parties' cost of investigation, consideration, and handling of the transaction.

Any such offers communicated to First Parties by Second Party will be made with the understanding that the First Parties shall have fifteen (15) days from the date such offer is received to either accept or reject such offer.

In the event any such bona fide offer to purchase is rejected by First Parties, Second Party will then have a sixty (60) day period in which to complete the sale to the Third Party, or to pay First Parties for their costs of investigation, consideration, and handling of such bona fide offer.

- 15. Second Party hereby agrees that during the payment period of this contract, and thereafter, for so long as the trade name T.S.O. (as defined) is used in Second Party's operation, all advertising (including without limitation), television, newspaper and radio, will be arranged for solely by First Parties in accordance with the following:
  - a. It is acknowledged that advertising by television, radio and newspaper directed toward the Dallas-Fort Worth market area is to the mutual benefit of all TSO offices in that area, therefore, Second

Party recognizes his obligation and agrees to pay his proportionate share of the expenses for such advertising on the following basis:

- (1) The percentage of television, radio and newspaper advertising costs born by the office of Second Party shall be computed by taking the accumulated gross annual sales for all offices within the *Dallas-Fort Worth* market area, including Second Party's office, and a percentage determined which is equal to the percentage of Second Party's office sales of the total sales of T.S.O. offices within such area; this percentage will be the percentage used in computing the office's proportionate share of such advertising expenses.
- (2) The above percentage will be applied to all of the aforementioned market area television, radio and newspaper advertising costs incurred during the next following calendar year, on a monthly basis, and such amount will be charged to Second Party's office monthly. Payment of such charge shall be made on or before the tenth (10th) day of the month next following. At the end of each calendar year, a new percentage figure will be determined in the amount as described above based on the percentage of the sales for that year, and the percentage figure thus obtained shall be applied in a like manner to all such advertising costs for the next year following.
- b. It is acknowledged that, from time to time, First Parties may deem it advisable to advertise in regional publications and/or national publications circulated regionally and Second Party hereby agrees to pay his pro-rata share of the cost of such advertising based on the ratio of sales of the office

- of Second Party of the total sales of all T.S.O. offices.
- c. Cost as referred to herein shall include actual production cost of media and any other cost directly related thereto.
- d. In addition, an amount equal to eight (8%) percent of Second Party's advertising cost as herein described shall be paid by Second Party to First Parties for reimbursement to First Parties for the production costs of such advertising. Example: If Second Party's total monthly billing for advertising amounts to Five Hundren (\$500.00) Dollars, the amount of Forth (\$40.00) Dollars will be paid to the First parties for production costs of advertising.
- e. In no event, however, will the liability of Second Party for all such advertising and production costs exceed an amount equal to eight (8%) percent of the gross sales of Second Party for a like period of time.
- 16. During the payment period of this contract, Second Party agrees to continue the operation of the office under the name T.S.O. (as defined) in all connections and in every aspect as to the operation of this office. Second Party agrees to operate said office in accordance with the general policies and business practices used by First Parties in other Texas offices. Such practices shall specifically include, without limitation, personnel policies and procedures, hours of operation, and the pricing of services and/or products by First Parties. First Parties covenant that the policies and procedures maintained and/or instituted by them for the office shall be in accordance with the policies and procedures practiced in other comparable Texas State

Optical Offices. Any deviation by Second Party from such practices or policies shall promptly be called to Second Party's attention as soon as practicable after discovery of such deviation by First Parties. Notice of such deviation shall be in written form and shall be sent Second Party by Registered or Certified Mail by setting out in specific detail the deviation to which objection is taken. In the event such deviation continues for more than five (5) days after receipt of such notice, Second Party hereby agrees to pay First Parties Fifty (\$50.00) Dollars per day for each and every day following the fifth (5th) day that such deviation continues.

After such payout period and for as long as the name T.S.O. is used by Second Party, Second Party agrees to operate said office in accordance with the general policies and business practices as used by First Parties in their other Texas Offices. Such practices shall specifically include, without limitation, hours of operation, pricing of services, and/or products by First Parties, as set forth above. Any deviations from such practices or policies shall be promptly called to Second Party's attention as soon as practicable after discovery of such deviations by First Parties. In the event the five (5) day notice is given and the Second Party does not correct or change such practices, then Second Party shall forthwith cease to use the name T.S.O. (as defined) in every respect.

Second Party shall pay all costs incurred in enforcing this contract, including attorney's fees, court costs, and/or other legal expense.

17. First Parties agree that Second Party is entitled to participate in any group optical plan agreement entered into by First Parties and Second Party agrees to provide materials and services in accordance with the terms of any such agreement to the extent patients

and/or customers of Second Party are entitled to benefits thereunder.

18. If, by operation of law, Doctors of Optometry are unable to conduct the practice of optometry under a trade name (i.e. T.S.O.) and it becomes necessary to change the form of operation to come within such law. Second Party agrees to make the necessary changes in order to effect the results and intent of this agreement as expressed herein. If it becomes legally necessary to separate, by means of a sub-lease agreement or otherwise, the practice of optometry from the sale and/or dispensing of optical goods, it is understood that the percentage payments for the purchase of the office as hereinbefore expressed (Section C, Paragraphs 2 and/or 3) shall include as percentage of cash all of the cash received for professional services and/or optical goods, howsoever or by whomsoever such optical goods and services are sold or dispensed, and shall include hearing aids and other allied and incidental products as may be applicable, it being agreed that in the event such change is made, the T.S.O. trade name shall be used for the dispensing optician business of the office operation, as distinguished from the practice of optometry, during the entire payout period, and beyond, if desired by Second Party. In addition and/or in the alternative First Parties may designate Texas State Optical Association, or another association, membership in which may be required of Second Party, to effectuate fully the intent and purposes of this contract. Second Party agrees to membership in such association, if deemed appropriate, by First Parties, to effectuate fully the intent and purposes of this contract. Second Party's membership costs shall by paid for by his office, it being the pro-rata share of the Association's operational costs and shall be the percentage of the gross sales of Second Party's office to the gross sales of all of the Association member

offices, but in no event shall annual cost to Second Party's office be greater than one (1%) percent of annual gross sales of Second Party's office. For example: If the annual operation cost is \$10,000.00, and Second Party's annual gross sales are \$200,000.00, and the annual gross sales of all association member offices are \$10,000,000.00 - then Second Party's pro-rata share of the cost would be two (2%) percent of \$10,000.00, or \$200.00.

19. It is hereby specifically agreed by and between the First Parties and Second Party that in the event any part of a paragraph or a section of this contract be declared void and of no effect by operation of law, or otherwise, that the voiding of any such provision or part of this contract and agreement shall not nullify or void the remainder of this contract and agreement. It is the intent of both the First Parties and the Second Party that this agreement be carried out to its fullest extend and both parties agree to exercise their best efforts toward the carrying out of this agreement except where prevented by operation of law.

The undersigned Parties hereby bind their heirs, assigns, and/or legal representatives.

EXECUTED IN DUPLICATE ORIGINALS, this 9th day of February, A.D., 1970.

,	s/s	
S. J.	Rogers, O. D.	
	e/e	
N I	ay Rogers, O. D.	

Richard P. McGuire, O. D.

## STATE OF TEXAS COUNTY OF JEFFERSON

BEFORE ME, the undersigned authority, in and for said County, Texas, on this day personally appeared S. J. Rogers and N. Jay Rogers, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they each executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 10th day of February, A.D., 1970.

Notary Public in and for Jefferson County, Texas

# STATE OF TEXAS COUNTY OF TARRANT

BEFORE ME, the undersigned authority, in and for said County, Texas, on this day personally appeared Richard P. McGuire, known to me to be the person(s) whose name(s) is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 9th day of February, A.D., 1970.

Notary Public in and for
Tarrant County, Texas

#### STOCK INVENTORY AND ACCOUNTS RECEIVABLE

As of the 1st day of March, 1973, Second Party shall purchase from First Parties the stock inventory and current accounts receivable of the office set forth below in accordance with the following:

- a. A detailed accounting of the said office's stock inventory will be completed as of the effective date of sale and Second Party shall purchase such stock inventory of the said office as of such date. The total sales price of such stock inventory shall be computed on the basis of the then Rogers Bros. catalog price of such inventory as would be paid by Second Party if he were purchasing directly from Rogers Bros. Laboratory or as would be paid by other associate or partnership offices of Texas State Optical. The total amount of such stock inventory shall be paid in six (6) equal successive monthly installments, without interest, commencing six (6) months after the effective date of sale.
- b. Second Party shall purchase the current accounts receivable of said office at an amount equal to eighty-five (85%) percent of the total amount of such current accounts receivable as of the effective date of sale. A "current account receivable" shall be defined as any account for which a payment has been credited within the

ninety(90) day period immediately preceding the date of determination. A detailed accounting of the accounts receivable for the said office will be effected so as to determine the exact total amount of such current accounts receivable as of the opening of business on the effective date of sale. Payment for such accounts receivable shall be made in three (3) equal successive monthly installments, without interest, commencing three (3) months after the effective date of sale. The non-current accounts receivable (over ninety days without a payment) shall not be purchased by Second Party, but eighty-five (85%) percent of the total collections thereon shall be remitted to First Parties.

WITNESS OUR HANDS this 9th day of February, A. D., 19 70.

S. J. Rogers, O. D., First Party

OFFICE:

No. 37 Haltom

s/s

N. Jay Rogers, O. D., First Party

s/s

Richard P. McGuire, O.D.
Second Party

EXHIBIT "A" TO CONTRACT DATED 9th DAY OF February, 1970.

The term "excluded area" as used in this Contract shall be defined as that area falling within a two (2) mile radius of the No. 37 Haltom Office at its location as of the date of execution of this Contract. It is specifically

provided, however, that any Texas State Optical Office in operation as of the date of execution of this Contract and falling within said two (2) mile radius shall be excepted from the provisions of Paragraph 9, Page 9, of this Contract.

### A P P E N D I X VOLUME II

FILED
JUN 8 1978

IN THE

MICHAEL RODAN, JR., CLERN

### SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1977

X

No. 77-1163

E. RICHARD FRIEDMAN, O.D., et al.,

Appellants

VS.

N. J. ROGERS, O.D., et al.,

Appellees

No. 77-1164

N. J. ROGERS, O.D., et al.,

Appellants

VS.

E. RICHARD FRIEDMAN, OD., et al.,

Appellees

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION, INC., et al.,

Appellants

VS.

N. J. ROGERS, O.D., et al.,

Appellees

Appeals From The United States District Court For the Eastern District of Texas

No. 77-1163 Filed February 16, 1978

No. 77-1164 Filed February 16, 1978

No. 77-1186 Filed February 21, 1978

Probable Jurisdiction Noted April 17, 1978

#### IN THE

#### SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1163 No. 77-1164 No. 77-1186

Appeals from the United States District Court for the Eastern District of Texas

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[In the United States District Court for the Eastern District of Texas]

#### DEPOSITION OF DR. ROBERT K. SHANNON

[page 3]

MR. NIEMANN: It is stipulated between Robert Keith, counsel for Dr. Nate Rogers and Dorothy Prengler, Assistant Attorney General, and Larry Niemann, attorney for Texas Optometric Association, that the TOA may intervene without objection from the office of the Attorney General, plaintiff intervenor, Texas Senior Citizens Association, Port Arthur Chapter

MR. KEITH: Intervene as a party to this cause.

MR. NIEMANN: Intervene as a party to this cause, subject to the Court's approval of such intervention. The purpose of the intervention at this time from the standpoint of Texas Optometric Association is for the purpose of participating in the deposition of Dr. Robert Shannon and Dr. Nelson Waldman, there having been objection by counsel for plaintiff to the participation by counsel for TOA without such formal intervention.

MR. KEITH: You do propose that you will intervene in good faith and not just appear for these purposes and then drop out again?

MR. NIEMANN: Sure.

MR. KEITH: Then I have no objection to the intervention.

MR. NIEMANN: The intervention today will be followed by Pleadings filed with the Court.

MR. KEITH: That's fine. I have no objection. So stipulated.

#### **EXAMINATION BY MR. NIEMANN:**

- Q. Dr. Shannon, would you please state your full name and current address for the Court.
- A. Robert K. Shannon, 119 Beachview Way, Bridgeport, Texas 76026.
- Q. Are you a licensed optometrist?
- A. Yes, I am.
- Q. In what states?
- A. Texas and Massachusetts.
- Q. Are you a member of the Texas Optometric Association at this time?
- A. Yes, sir.
- Q. How long have you been a member?
- A. Approximately four years.
- Q. What is your present occupation?
- A. I am an optometrist.
- Q. Are you currently retired, or are you practicing?
- A. I am for all practical purposes retired.
- Q. Doctor, I would like to discuss simply a brief history of your practice and profession of optometry since your licensing. Can you begin by telling us in story form the high points of your practice and your participation in the commercial optometric chain in Texas and in other states in chronological sequence, just an overview.

#### A-101

A. I graduated from school in '38. I passed the Massachusetts Board shortly after graduation and went into practice at Natick, N-a-t-i-c-k, Massachusetts, where I had an exclusive office, did no advertising.

I went into the service, and while in service I took the Texas State Board examinations upon one of my returns from overseas duty, and was successful in passing it.

Upon being released from active service, I went into practice for an optometrist at Waco, Texas.

- Q. About what year was this?
- A. 1946, November, I believe. I worked for this Optometrist for approximately six months and purchased an office that was owned by Ellis Carp that was located a block or so away from where I had been working for this other optometrist. I changed the name of the office and went into private practice, and approximately a year later I formed a partnership with Dr. Carp.
- Q. Dr. Ellis Carp?
- A. Yes, Dr. Ellis Carp of Dallas, and we had this partnership in effect for the first time until either the latter part of 1956 or the early part of 1957.
- Q. What names did the partnership operate under?
- A. We operated under a number of names, Lee Optical being one, Shannon Optical another, Plains Optical.
- Q. I will come back to this in a moment. Following your partnership with Dr. Carp and your practice of optometry under Lee Optical, Lee Optical and Plains Optical, what happened next?

A. I sold out my interest in the partnership in its entirety to Dr. Carp and moved to Arizona, and I went into the optical industry as an optician in Arizona, and I purchased from Dr. Carp the Arizona corporation that he had, which consisted only of one office. I conducted that business until approximately five years ago when I sold it in its entirety.

At that particular time it consisted of three offices and a wholesale laboratory all under a mother corporation called Optico Industries.

Upon the sale, completion of that sale, my family and I moved back to Texas. Approximately six months later I purchased the practice of Dr. John Herrin at Richardson, Texas, and that is the location of practice in which I am engaged at this particular time. However, I have sold the practice to Dr. Gerald Sparks, and for all practical purposes I am retiring out of the practice, but I am there on a consulting basis and do attempt to aid and assist him as necessary.

- Q. Doctor, I would like to back up and talk about your partnership with Dr. Ellis Carp and get the details from you, if I may, more the specific details of your partnership and the manner in which you operated that partnership. Let me first ask you were there any other partners besides you and Dr. Carp?
- A. Initially, no; later Dr. Stanley Pearle, P-e-a-r-l-e, became a partner in some of the offices that were opened after he became a part of the organization.
- Q. When you say offices, were those combinations of -what was done in a typical office that was owned by your partnership with Dr. Carp?

- A. Some of the offices were located in a jewelry store, namely, the Zale's Jewelry Stores or Gordon's Jewelry Stores. Others were privately leased offices, space. In all, we hired optometrists, we advertised price, advertised credit terms and we operated under various names within the same city.
- Q. For example?
- A. For example, we could have a Lee Optical office, and we could have a Downtown Optical all within the same city. This was done at Waco, per se. In Houston we had similar offices. In Austin we had similar offices, San Antonio, Corpus Christi.
- Q. Did they go under any other names other than Downtown Optical, Lee Optical and Shannon Optical and Plains Optical?
- A. They may have, but I don't recall the names at the moment.
- Q. Doctor, you mentioned that your partnership employed an optometrist in each of these offices. Could you give us the general nature of the staff of these offices, who hired them and who controlled the staff and the optometrists?
- A. Well, for the most part the personnel were hired by me, and the auxiliary staff within the office would consist of as few people as we actually had to have in order to take care of the volume. We did not believe in overstaffing an office. The doctor of optometry was set up as the office manager, and all policies and procedures were given to him by me, and these emanated from the home office, which was governed by Dr. Carp and Dr. Pearle and myself, and Mr. Shaunbaum, who was employed as a business advisor, and later became a business manager for the Lee Optical Company.

- Q. When you say office policies and procedures, would that include the day-to-day operations and procedures for handling patients from an administrative standpoint?
- A. Yes. It took care of everything from the cleaning of the office to what frames were to be displayed in the window display, to what price we were to sell a particular frame for and what the glasses complete were to be charged to a patient. We handled all advertising. The doctors had nothing to do with advertising. They had no control in terms of business management. They were there to examine the patients and to take care of them to the best of their ability, but the prices and all fees and so forth were all handled, given to them by one of us, namely, in many cases it was by me.
- Q. Is it fair to say that the optometrists employed by you in these offices exercised very little discretion with regard to office policies and procedures?
- A. They weren't given any latitude. This was the way that it was, and it was done that way.
- Q. So, control emanated from the home office?
- A. Yes.
- Q. In Dallas?
- A. Yes. They were employed, right.
- Q. When you say employed, does that mean that you had the right to terminate their employment at any time you so chose?
- A. Yes, we could have.
- Q. Did the optometrists own their own equipment?

- A. No.
- Q. Did the optometrists in your employ have discretion concerning what laboratory to use for lens fabrication?
- A. In most cases, no; in a few remote cases the optometrists might be granted the right to use a local laboratory for some special work that had to be done for one reason or another, time factor usually being the most important, could not be handled by having the prescription processed through Dallas. For all practical purposes, all prescriptions went to one laboratory.
- Q. Who owned that laboratory?
- A. At that particular time, at the initial concept of this all, the bulk of our business was being done with Southwestern Optical, and it was owned by Mr. Bogart and a Mr. Greenberg. I don't know whether their wives participated, but they were the two that I know as owners.
- Q. Did you eventually have your own laboratory?
- A. Yes. I had no ownership in it, however, but a laboratory was formulated, and it was called Daltex Optical, and Mr. Greenberg became a part of it, and severed his relationships with Mr. Bogart. I became the laboratory manager for Daltex Optical.
- Q. How about the other partners with you; did they have an interest in Daltex Optical?
- A. Dr. Carp did, but Dr. Pearle, to the best of my knowledge, did not.
- Q. Was it then required by your partnership with Dr. Carp and Dr. Pearle -- was it required by your

partnership that these doctors of optometry associated with the optical offices owned by your partnership, that they send their prescriptions to one particular laboratory?

- A. Yes. It was Daltex Optical, again, with very few exceptions.
- Q. Did the office policies laid down by your home office require that there be no appointments by patients, but rather a wait-in-the-lobby or wait-in-the-line type method of appointments?
- A. Yes. We did not go on an appointment basis on any of our offices.
- Q. Would you explain the reason why?
- A. Patients were taken on a first come, first serve basis, and get them in and get them out as rapidly as we could was our policy. It's possible that a doctor might for some reason that I don't know, might say to a patient that "Well, come in at 4:00 o'clock in the afternoon and I will see you," but we are speaking in terms now of the multitude of people. We had a no-appointment basis set up. In fact, we advertised in our window no appointment necessary.
- Q. In deed, Doctor, isn't a no-appointment basis more compatible with advertising than an appointment basis in practicing optometry?
- A. Certainly. We were very interested in building a volume business. You can't do this on holding time for an appointment.;
- Q. You had mentioned the word "volume" on several occasions, Doctor. Was volume necessary for your office to make a profit?

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- A. Yes. It's the only way we could survive.
- Q. Was that because of the overhead cost of advertising and expensive lease space of the locations that you had?
- A. It was general operating costs.
- Q. So, volume was a sine qua non, so to speak, of your operation?
- A. Definitely.
- Q. In order to maintain that volume, it would not be possible if patients as a general rule are seen only by appointment?

MR. KEITH: I object to the question as leading.

- Q. Would it be possible for you to maintain that volume
- A. I don't feel we could have possibly maintained the volume practice if we had set it up on an appointment basis. In most cases we had just a single doctor in there and an office, and when patients came in, we wanted them taken care of immediately, and in this manner if we got a backlog of patients, why, the doctors would be so advised that "You have got a backlog of patients. Come one. Let's try to hurry it up," and so on. If you do this on an appointment basis, you are automatically limiting the amount of people that can be taken care of in your office.
- Q. Were the doctors under either expressed or implied instructions from the home office to examine patients and operate their office so as to prevent people from getting tired of waiting in the lobby and walking away?

- A. Well, all doctors that I can recall of, all participated in a percentage of the total monthly cash sales as part of their earnings. This was told to them not once, but on many occasions. The more patients you saw, the more dollars that came into the office, the more earnings you are going to make. So this became the incentive rather than my going to the doctor and say, "Now, look, you are going to have to speed up your work," and so forth. He would do it automatically to see as many patients as he could because the more patients he saw, the more dollar bills that came into the cash register, the more earnings he would obtain.
- Q. Were there ever contests between offices on patient volume or dollar volume?
- A. Yes. We had inter-office rivalries, and the figures of one office would oftentimes be told to another office. The amount of patients seen by an office would oftentimes be told to another office as a means of trying to excite that second office to meet the volume that the previous or first office had had. Yes, this was done.
- Q. Did your control extend to the setting of examination fees by the optometrists?
- A. Yes.
- Q. They had no discretion in this regard?
- A. No. They had no discretion. They were told the examination fee, as I recall in those days, was three dollars.
- Q. Did the control extend to requiring the office to purchase their frames and other ophthalmic materials --

- A. Would you say that again?
- Q. Did your control extend to requiring the particular optical office to purchase frames from a particular source or from an exclusive source?
- A. The office itself didn't purchase any frames. The inventory was set up at the time the office was opened, and the people in that office, the doctor and people had no control over what inventory was going in there.

From time to time we would add inventory to it or we would take inventory from it, but the personnel themselves could not purchase frames except on a prescription basis, if you want to call as such, but here the office wasn't buying the frames; it was filling a prescription through our own laboratory.

- Q. Was a certain portion of each office's income designated towards advertising?
- A. Yes. We usually tried to set up a figure, and this was a figure that we would assume that the office would meet in terms of volume. We would set up five percent of the estimated volume of that office for advertising. Usually this was the amount. In some cases it would become more if the office volume did not come up to our expectations. Then more money would be put into advertising, far in excess of the five percent of its total monthly sales, in order to try to increase traffic flow.

In other offices where we had a high traffic flow, it is conceivable that the advertising budget could be cut back, but the overall figure was five percent, was abitrarily set up for advertising.

Q. To what extent did the local optometrist employed in a local office verify the lens prescriptions upon

- their return from the laboratory to the local office?
- A. In most cases he didn't verify them at all. People within the office on his staff did the verification. The optometrist himself was kept busy refracting, and when the work would come in from the laboratory, it would be for the most part inspected by one of the people in the office.
- Q. Is this a lay person?
- A. Yes.
- Q. Generally speaking, would the optometrist verify lens if there was a complaint?
- A. Yes. He would verify the spectacle correction at that time.
- Q. Doctor, is the ordinary layman capable on their own of detecting most of the kinds of errors that are made in lens fabrication?
- A. No. I would say you would have to have a trained individual to do this.
- Q. So, verification only upon complaint -- would verification only upon complaint catch most of the errors that might be made in lens fabrication?
- A. In most cases, yes. In most cases, yes, and some of the offices, we did have some well trained opticians, but in many other offices we had lay people that had no information whatsoever, background whatever of the optical industry. They would be put through a training program and would be shown how to handle the equipment to the best of their ability.
- Q. If I understand you correct, you are saying that most of the errors could be caught by the lay persons in your office?

- A. No, I don't say that is true. Some of the errors would be caught by the lay person. If they were a violent error, yes, they would probably be caught. If it was a small error that could cause some problems, the chances were that they would not have been able to have detected it.
- Q. Doctor, is lens verification by a qualified person capable of detecting error an important part of optometric care?
- A. Oh, certainly.
- Q. In deed, Doctor, a correct examination and a correct writing of a prescription is useless if the lens prescription is filled incorrectly, is that not correct?

MR. KEITH: I object to the question.

- A. Yes, that is correct. You can have the finest examination in the world, and you can write an excellent prescription, but if the prescription is not compounded correctly, the result is worthless.
- Q. Let's talk about why the doctors in your local offices do not take the time to verify the lenses that were returned from the laboratory.
- A. The reason for it is that in most cases our offices were busy, and we had one optometrist doing the work of maybe one and a half or two, and they were kept busy refracting. There is only so much time in the day, and if they are busy in refracting them, they don't have time to oversee the cleaning of an office or training of personnel or the verification of a pair of glasses or whatever other duties might come upon them.
- Q. How were case histories taken in your offices, Doctor?

A. Usually, the patient would be seated in the examining chair, and the doctor would say, "What's your problem? How is your general health?"

The case histories would be taken by the doctor, but they would be a very short case history while he was doing the refracting.

- Q. That is because of the pressure of time?
- A. Yes.
- Q. Was there a continuing personal relationship between the doctors of optometry and the patients at you local offices?
- A. No. There was no -- for the most part, there was no personal relationship. The patient was an individual that had a service performed by a doctor, and as soon as that patient got out the doctor's door, another one came in. For the most part, the doctor would not recall that patient unless it was a most unusual circumstance that went along with it.
- Q. You are saying, then, that the examining doctor did not know the patients by name or remember them by name?
- A. That's correct.
- Q. How about vice versa?
- A. I would say the same. In most cases the patients were not introduced to the doctor in our offices. The patient would be told by one of the girls or one of the clerks in the office, "The doctor is ready for you. Come with me," and she in turn would take him or her into the examining room and say, "Please be seated. The doctor will be with you in just a moment."

Q. In what percentage of the new patient cases would the patient previously know the doctor by some --

MR. KEITH: I object to that question unless there is some basis to support the answer; otherwise, it's pure speculation.

A. It would be very low.

MR. KEITH: Let me finish. I object to the question as calling for a speculative answer unless he has some detailed information upon which he can base an answer as to what the patient would do before the patient arrived at some hypothetical office.

MR. NIEMANN: Are you finished with the objection?

MR. KEITH: Yes, sir, I am.

- A. The only time a doctor would know -- or the patient would know the doctor, that I can recall, is when we employed a doctor who had been located in that particular locale, and we placed him into one of our offices located in that immediate area. This happened on very very infrequent occasions.
- Q. How did the patients then come to your office?
- A. Through advertising and through our locations, the attractiveness of our locations, through advertising.
- Q. Contrasted to the personal reputation of the doctor of optometry?
- A. Yes. I am sure that's true. We did not spend advertising money advertising the doctor. We spent advertising money advertising ourselves, the organization, Lee Optical or whatever the name was that we advertised under.

- Q. Are you then saying that the patients coming to your office were there primarily through advertising efforts rather than through the reputation of the doctor for competency?
- A. Yes, I would say that on the whole. They came because of advertising, I do believe. They came because maybe word of mouth. They came because of our location. It's conceivable that someone might say, "There's a good doctor down at" such and such office that we own. "I got my glasses or eye care there, and I would recommend for you to go there," but for the most part, that individual would not know the name of the doctor.

I, myself, had been mistaken many many times for the doctor who was normally at his office when I did vacation relief work.

- Q. I would like to momentarily touch back on lens verification. What percentage of lenses that were shipped from your laboratory to the local offices were rejected or returned by the doctors or by the office for defects?
- An extremely small percentage. I would estimate in those days less than one percent.
- Q. How does that compare to your own personal history of rejects when you were practicing professionally in the later years?
- A. I would estimate that our rejection rate in the past five years, four years, whatever the case may be that I have been at Richardson, it probably runs eight percent, seven to eight percent. So it's considerably higher than what it was.
- Q. What, generally speaking, are the kinds of

laboratories you use or you have been using in your private practice, which was a professional practice, as I understand?

A. Yes. I practiced under my own name for the most part. For the most part it was restricted to contact lenses, so, therefore, the bulk of the service I get from the laboratories are contact lenses. In terms of spectacles, I have purchased some from Omega Optical, some from American Optical, some from Bausch and Lomb. My contact lenses for the most part are purchased from Custom Quality Contact Lens Laboratory in Dallas, and my rejection rate again is not high, but I think they know that if these lenses are inspected very minutely, if they are not made the way I want, they will be rejected.

But at least I maintain the quality control on the product, if that's what you are trying to lead me to or what me to say or not want me to say.

- Q. I just want you to say the truth, Doctor.
- A. I don't have somebody telling me, look, these check out at the laboratory level, and so, therefore, if they check out at the laboratory level, you have got to use them.

This is what I have had in the past. This is what I don't have now.

- Q. Doctor, do the laboratories you use know that you verify your own lenses?
- A. Yes, they sure do.
- Q. From your past experience with independent laboratories, would you surmise that your rejection - the percentage of lenses that should be rejected would even be greater if they knew you were not verifying your lenses?

MR. NIEMANN: I am asking him to answer the question based on his experience as an owner of an optical laboratory and as a practicing optometrist doing business with optical laboratories over the past thirty years.

MR. KEITH: Which lab are you asking him to speculate whether they would or would not provide quality work if they did not check it; is it any particular lab?

MR. NIEMANN: Talking about all the labs he uses or has used in his practice of professional optometry.

MR. KEITH: I object for the reason that it calls for speculation.

- Q. (By Mr. Niemann) Let's go ahead and answer, if you understand the question.
- A. I think I understand your question. As an owner, past owner of an optical laboratory, you get to know your accounts over a period of time and you get to know the type of quality that a particular doctor insists upon having. Through telephone or personal conversations with the individual you have determined whether he personally is checking or whether one of the girls or some other individual in the office is checking the work, and common sense will tell you if a pair of glasses seem to check out fairly close and you think you can get away without having to make a new pair of lenses, you may be of a mind to go ahead and pass that job.
- Q. Would that judgment be colored by whether or not

you knew the doctor was a real stickler for exactness?

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- A. Yes, of course.
- Q. Or a little bit looser than normal?
- A. Yes, absolutely so. That would be the basis for it, with the understanding -- and oftentimes we would call the doctor and say, "Doctor, we have checked this job and it's just a little bit out of tolerance, out of our accepted laboratory tolerances. If you would, why don't you try it, and if you have any patient repercussions or what have you, let us know and we will remake them for you immediately."

With other doctors, other accounts that we had, we knew that we couldn't do this, so it automatically meant we remade the job before we ever think in terms of sending it out or calling him.

With other accounts that we had, they could care less whether it met our laboratory standards for competence or not. So we at the laboratory level in many cases were setting forth the standards that the account had to accept.

- Q. In you personal history does your rejection rate remain fairly constant whether you are dealing with Omega, Bausch and Lomb or American Optical?
- A. I would say so, yes. I think all of the laboratories are trying to do the very best job they can possibly do, and they have personnel troubles just like anyone will have.
- Q. Doctor, this is not out of the norm or unusual for there to be a certain percentage of rejections after lens verification by the examining doctor, is it?

- A. No, not at all. Not at all.
- Q. That's one of the primary purposes of lens verification, is it not?
- A. Yes, certainly.
- Q. That for the most part, are those persons who fabricate or grind the lens, are they licensed optometrists, to your knowledge?
- A. The people that make the glasses?
- Q. Yes.
- A. No. They are lay people. They are lay people who are taught in my laboratory. They were put into a training program, and they were taught to do one particular phase of the making of a pair of glasses, and that's all they knew how to do, was operate that one machine or whatever the task was. If they felt they wanted to upgrade themselves, we did have a training program available for them that they could avail themselves of in their free time so that they could upgrade themselves and make more money by advancing to a more complicated task within the laboratory.
- Q. Of this eight percent rejection rate that you estimated, Doctor, if you had not rejected those and had gone ahead and fitted your patients with those lenses, anyway, what percentage of those would you receive complaints on? Let me ask that question in another way. How many of those rejects would the normal patient be able to detect on his own, and thereby complain?
- A. Some of them, they would have been able to have detected it immediately because we would have had a warped lens. I am speaking now of a contact lens.

Here we have a warped lens, and it would have given problems to the patient immediately.

We had other lenses that had too sharp an edge, other lenses that were too thin, other lenses that were too thick, other lenses that were off-color. Many of these things will immediately manifest themselves.

- Q. To the patient himself?
- A. To the patient, right, immediately. In some cases, again, you are speaking of patient tolerance. I have had many patients that unfortunately have gotten their lenses mixed up and put the left lens on the right eye and the right lens on the left eye.
- Q. How about eyeglasses?
- A. Well, eyeglasses, you are in a little different situation. The tolerance again depends upon the severity of the correction, the need for it. In most cases if a pair of glasses is not compounded correctly and it's just a slight degree out of tolerance, they could probably be accepted by the patient, and they may not give the visual comfort that they would like to have, but they are better than not having any at all.
- Q. Would the patient really have any basis to judge whether or not it was a correct lens or not?
- A. Only in terms of what they think their visual performance should be against actually what they are receiving. That would be the only judge, that and asking a person like yourself who wears glasses, "Well, can you see across the street?"

If he says, "Yes, I sure can. Well, I can't with these glasses," then there must be something wrong. But

they would still be better than none at all for them. possibly.

So it gave them some element of visual efficiency, but not the full degree they would like to have had.

- Q. In other words, what the patient doesn't know, doesn't hurt him about defects?
- A. Yes, that's correct.
- Doctor, would an incorrect eyeglass lens -- could an incorrect eyeglass lens prescription, either by error in the writing of the prescription or an error in the fabrication of the prescription, cause discomfort for the patient?
- A. It's possible.
- Could that discomfort cause headaches?
- A. It is possible, yes, it could.
- Q. Would incorrect or would certain kind of incorrect prescriptions or incorrect fabrications interfere with the visual learning process?
- A. Yes, definitely so.
- Q. In fact, it could affect a person's school performance?
- A. Yes, certainly. I feel this way: If you have a prescription, it should be made correctly. If it's made correctly, it should give maximum visual achievement to that person. It would be the same thing in essence of saying to you -- your physician says, "Mr. Niemann, take two aspirin," but you only take one. You are not getting the full prescription, so, therefore, you are not going to get the full benefit.

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If you have a pair of spectacles that are made incorrectly, there are multiple conditions that could occur. If you have a situation where the distant visual achievement is not up to the level that it should be when a person is driving a car, it could endanger your life as a pedestrian crossing the street if that person happened to be in the vicinity. There are a multiplicity of conditions.

- Q. Would it affect a person or adversely affect a person's work efficiency and work performance?
- A. Yes, definitely. This is all part of the testing that one does in terms of industrial vision.
- Q. Could an incorrect lens prescription or incorrect fabrication of lenses have an effect on a person's emotional wellbeing?
- A. Certainly, yes.
- Q. And thereby, his relationships with family?
- A. It could.
- Q. And friends?
- A. It could. Especially this is true with contact lenses.
- Q. Doctor, was your ownership in Lee Optical limited to any particular offices?
- A. Yes. Yes, it was. I had ownership in offices only in Texas, and not in all the offices in Texas.
- Q. For example, in your Lee Optical offices in Dallas, did you operate them on weekdays and Saturdays?
- A. Yes. They were open six days a week, all day every day.

- Q. Does this also hold true for your other offices?
- A. Yes. All offices were opened six full days a week.
- Q. Was Saturday your biggest day?
- A. Yes, no question about it.
- Q. Can you give us some idea of the number of patients that would be examined by one optometrist in a typical office on a Saturday?

MR. KEITH: I object unless he can identify the Saturday or the optometrist, the office or something.

- A. Well, I could tell you this: The office was on East Grand, and the doctor's name was Dr. Elless, I had employed Dr. Elless. He came to us from California. I think his first Saturday he had, as I rightly recall, something like fifty-one or fifty-two patients he examined.
- Q. In one day?
- A. In one day, yes.
- Q. Was this a very unusual day, or was this a typical Saturday?
- A. This was more or less a typical Saturday at that office.
- Q. Generally speaking did the same thing happen at other offices?
- A. Yes.
- Q. In Dallas?
- A. And elsewhere, yes. We had a Dr. Northcross, Patrick Northcross, that was associated with us in

- an office at Wichita Falls, and he would examine forty-five to fifty patients in a day. I have seen him do it not once, but many times.
- Q. How about during the week?
- A. During the week the volume in the offices would slow down, and it would build to a crescendo on Saturday. Saturday was our busy day, as all our advertising was beamed toward Saturday. We would do all our heavy radio advertising and all our heavy newspaper advertising, and later into television, all beamed for Saturday's business. We would do the bulk of our television advertising on a Friday evening. The same on newspaper advertising, would be in Friday's paper.
- Q. Then are you saying that inherently when patients are derived through advertising, that your biggest day is Saturday?
- A. Yes. We had found that to be true here in Texas.
- Q. Why is that?
- A. And certainly we found that true out in Arizona.
- Q. Why is that?
- A. Well, the average gentleman is not working on Saturday, so, therefore, it's a convenient time for him, or it gives him an opportunity to take care of the family while his wife has her eyes cared for or vice versa, as the case may be.
- Q. Is that kind of high volume conducive to quality eye care, Doctor?
- A. I don't think so.
- Q. How many patients do you examine on a day in

- which your calendar is full? Assuming that you are examining only for eyeglasses.
- A. Well, I have run accurate tests on this. It takes me an average of approximately thirty-five minutes to run a refraction, a complete refraction. This takes care of my case history, and it takes care of the refraction and so forth on the average patient. This is not for contact lenses. My office hours are from 9:00 until 5:00, and my receptionist usually spaces these appointments an hour apart. This gives me an opportunity if I have to spend more time with a patient, I can do it. If I am able to take care of the patient to the best of my ability in less time than she has allocated, then it gives me an opportunity to have a rest period or to do some other work that needs to be done in the office.
- Q. Are there situations where an examination will take longer than thirty-five minutes?
- A. Certainly.
- Q. Are there situations where an examination can take up to an hour or an hour and a half?
- A. It's conceivable, although I, myself, don't allow this to happen. If I find that at the end of my examination I have findings that are not typing out as I feel they should, rather than to keep the patient there and to overtire them by making a repetition of a number of the tests within the overall examination, I will have them rescheduled back into my office at a later date. But the overall period of time that I might spend with that patient in just examining could conceivably be an hour and a half, but not at one time.
- Q. Doctor, how did these special problems get handled

- by your offices that were running a noappointment, high-volume method of practice?
- A. They were handled to the best of the ability of the individual refractionist. That's the only answer I can give. If he had complaints and couldn't solve them and so forth, then the patient would be referred elsewhere, usually to an ophthalmologist.
- Q. Let's talk about the specific hours of the typical Lee Optical office that you were referring to earlier as having as many as forty-five or fifty patients on a Saturday. They open at 8:00?
- A. They open at 9:00 in the morning.
- Q. And closed at what time?
- A. Closed at 5:00.
- Q. Would the optometrist take off time for lunch?
- A. No. In a case such as this, he would have one of the girls bring a sandwich into him or might possibly take a lunch from home and would attempt to eat the sandwich between patients or some such thing as that.
- Q. Doctor, to the best of my arithmetic calculations, fifty patients divided by eight hours is approximately more than six patients per hour, and that's an average of ten minutes per patient, is that correct?
- A. Yes.
- Q. In your opinion is that a sufficient time frame within which to render a quality eye examination?
- A. No, it is not.

- Q. When a doctor is under compulsion to speed up his examination, is it true that he either has to cut short some aspects of the examination or eliminate come elements of the examination?
- A. I am certain that's true, yes.
- Q. Could we talk for a moment about the general steps or elements of an eye examination? Do you begin with the case history?
- A. I do, yes.
- Q. Do you next examine for pathology?
- A. Yes. However, first I usually run a vision test, and then I examine for pathology.
- Q. Does the vision test include refraction?
- A. No. The refraction occurs after having done the elimination of the test for pathology.
- Q. The outline as far as your particular procedure is --
- A. Mine may be a little different from someone else's.
- Q. Would you outline that for us, the major elements?
- A. First is the case history, second is distant vision with or without their spectacles they are wearing, or contact lenses, as the case may be, and near vision with or without the contact lenses they may have or the spectacles, ophthalmoscopic or pathological examination, static retinoscopy, dynamic retinoscopy, subjective examination and distance habit phorias, distant and at near, induced phorias at distant and near.

I am trying to recall this. I do it automatically. Views cross cylinder examination at near, induced

- phoria at near through the near prescription, measurements of the distance, the near distance, reading blood pressure, tonometry, color vision. That is the normal procedure that I use.
- Q. Following that you exercise your judgment in determining the proper prescription in accordance with your findings?
- A. Yes, for spectacles.
- Q. Doctor, are prescriptions just an automatic computerized result of the findings from your refraction, or is professional judgment exercised in writing the prescription?
- A. Professional judgment is exercised.
- Q. Following that is there a step that would involve advice and consultation and instructions to the patient?
- A. Certainly.
- Q. Following that is there a lens verification procedure when they are returned from the laboratory?
- A. Well, you are getting the cart before the horse. After you advise the patient of what you feel would be the best form of visual therapy for them, and assuming that it happens to be spectacles, in my office we advise them that they are welcome to a prescription or they are welcome to visit our frame display area. Possibly they can see a styling of frame that they would like, and if they don't we would be happy to give them a prescription. Assuming we fill the prescription in our office, the glasses then are ordered and come back from the laboratory, and they are verified.

After they have been verified and they meet our quality control, then and only then is the patient called to be advised that their spectacles are ready for them, and we set up an appointment time for them to be dispensed.

- Q. If a doctor, as you have earlier testified, is averaging ten minutes per patient, where does he start cutting back on the time or the elements involved in these steps that you have just outlined?
- A. He does only, or has done only what he had to do in order to come up with what he thought was a prescription that would satisfy the patient.
- Q. You are talking about the doctor employed by your partnership?
- A. Yes, that did this ten minute or less examination. Later the State Board adopted a provision in the chapter, which was the Basic Competency Act, which states that you must perform certain tests, but prior to that time you did whatever you wanted to do as an optometrist.
- Q. Can you tell us how the adoption of the Basic Competency Rule changed the number of patients seen by one of your doctors?
- A. Yes, It definitely slowed up the examination time because now the doctor had to perform so many tests within the overall examination in order to comply with the State law. If he didn't do this, then he was placing his license in jeopardy for a suspension or revocation.
- Q. After the Basic Competency Rule was adopted -- let me back up for a moment. Did the owners of the optical chains such as yourself object or fight in any

- way the adoption of the Basic Competency Rule by the Texas State Board of Optometry examiners?
- A. I can't speak for other organizations, but for our own, we were not particularly in favor of it.
- Q. For the very reason you stated?
- A. Yes.
- Q. It would slow you down?
- A. It would slow us down.
- Q. Once it was adopted, how much did it slow you down?
- A. In my particular case, it slowed me down probably an additional five minutes. I don't know about the other doctors, but I can tell you that we were seeing less patients per given period of time after the adoption of that passage into the law than what had been seen prior to its passage.
- Q. Well, you testified earlier that some of your offices were seeing as many as forth-five and fifty on a Saturday prior to the adoption of the Basic Competency Rule. After the Rule adoption, what would a typical volume be for one doctor in one of your offices on a Saturday?
- A. Well, let me put it this way, that again, in the case of the East Grand office located in Dallas -- and this is specific -- on numerous occasions on Saturday I have gone to that office to examine patients that Dr. Elless was not able to examine because of the backlog of patients that we had, and so now there are two doctors in the office examining.
- Q. Well, would you say --

- A. I would say that Dr. Elless would probably have been able to see a third less patients, at least a third less, by following the Basic Competency Rule that what he had been able to see prior to its adoption.
- Q. You would say that they were examining in the range of thirty to thirty-five patients?
- A. Maximum.
- Q. On a Saturday?
- A. Yes.
- Q. Rather than forty-five or fifty?
- A. A single doctor.
- Q. A single doctor?
- A. Yes.
- Q. Doctor, according to my calculations, a doctor seeing four patients per hour for eight hours would examine approximately thirty-two patients in a day. That leaves fifteen minutes per patient. In your opinion is that sufficient time to give a quality examination?
- A. It isn't for me personally. For some other doctor, he might say that he can do a quality examination in fifteen minutes. I can't do it in that period of time, but I can tell you this, that when we had this pasage of this Basic Competency Act take place, we went into a heavy promotion within our offices in terms of creating sales by offering premiums and so forth on the sale of two pairs of glasses. So all of the personnel within the office were urged to sell two pairs of glasses to this patient rather than the single pair that heretofore had been supplied because

what occurred is that with the drop in the number of patients that we were seeing, so were we having a drop in our overall sales. The figure that we were interested in within the home office is primarily sales, and the theory was that if the sales were taken care of, the profit would take care of itself. So, in order to keep our sales volume up, we went into a programming where we stimulated the second pair plan, as it was called, and we would pay bonuses to the personnel in our offices who attempted to dispense a second pair of glasses to his patient. We would give the patient themselves a special price on the second pair of glasses, where the glasses would have cost them maybe five dollars less than what they normally would have cost were we able to fill that prescription for the second pair at the same time as the initial fitting of the first pair.

Of course, as far as the doctor was concerned, by keeping the sales volume up, his earnings were staying up there where they belonged because he was receiving in addition to his basic salary a percentage of the monthly cash received in that office.

- Q. Was price advertising in the newspapers a major means of procuring patients when you were a partner in Lee Optical?
- A. Initially advertising in the newspaper was the major market. Later it became television, but initially, yes, it was newspaper.
- Q. Was price advertising heavily utilized?
- A. Definitely. Every ad that we ran had a price ad in it. We tried to be lower than our competition.
- Q. Do you have any knowledge of what percentage of

your total sales volume was represented by your advertised prices?

- A. Approximately two percent.
- Q. Does that mean ninety-eight percent of your sales volume was in excess of the advertised prices?
- A. Yes.
- Why?
- A. Because the frame selection was better, and we had sales people in the office that would suggest to the patient that they should have this frame, it looked nicer on them than the one that they could get at the advertised price, or they should have tinted lenses or whatever the case may be.
- Q. Was the frame selection of the advertised low price less desirable?
- A. No question about it. It was a frame styling that -- it was either a discontinued frame that was no longer being made by the manufacturer or it was a frame that for one reason or another we had elected to discontinue.

In any manner, it was certainly not a frame styling that would be one that a patient could say. "Gee, I got my glasses at Lee Optical and I only paid thirteen eighty-five," or whatever the case may be for them, "and I am very proud of them."

Whereas if they pay twenty-five dollars for them. then they could say, "I have got a Toura frame," or whatever the case may be, and could show some element of proudness that they had gotten a better quality product.

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- Q. Was the purpose of your price advertising -- was the primary purpose of your price advertising to inform the consumer or to entice him to come to your office?
- A. To get him into our office, to increase volume.
- Q. In other words, are you saying the price was used primarily as a lure?
- A. As a lead.
- Q. As a lead?
- A. Yes, to get them into our office. In the days that we are speaking of, Mr. Niemann, many many people were advertising, and our advertising just had to be bigger and better or cheaper and lower or something, and this is what we were doing.
- Q. You are saying you were doing the same thing the other competition was doing?
- A. Certainly.
- Q. Including TSO?
- A. Yes. They were our major element of competition.
- Q. Getting back to the quality of lens fabrication, when the wholesale laboratory, such as yourself, Daltex. had a locked-in source of customers such as your branch offices, did that in any way have any consequence on the quality of lens blanks that were purchased by your wholesale optical laboratory?
- A. Yes. We used whatever they had available, and out at the individual office the doctor wouldn't know whether this was an American made lens or a foreign made lens. He wouldn't know whether it was a top quality American made product or a

second quality, or whatever the case might be.

- Q. Do your doctors have the discretion to prescribe certain quality of lens blanks to be used?
- A. No. They could only specify the type of prescription, but they did not specify the type of lenses, the manufacturers' names. They would specify the power of a lens. On occasion they would specify the type of bifocal or multi-focal that was to be used, and they would specify a tint, but as far as writing a complete prescription and specifying the type of lens and manufacturer, so forth, no, they had no control over that at all.
- Q. Did your wholesale optical laboratory ever purchase lens blank second or inferior --
- A. Mr. Niemann --
- Q. Or not top of the line lens blanks?
- A. Let me again emphasize I did not have an ownership in Daltex, but I was familiar with the inventory. When you are talking to this, are you speaking of Daltex?
- Q. I am referring to Daltex, and I think we have understood each other as referring to Daltex, the wholesale optical laboratory from which the Lee Optical offices were locked in as a source of supply.
- A. Lenses were purchased by Daltex at the best possible price that they could possibly be purchased. Many of your lens manufacturers for one reason or another will take a lens that does not meet the quality of their top line. Possibly it has a small scratch, maybe the multi-focal segment might be a little smaller or larger. There is some imperfection. Maybe it's a chip out here in the lens

or what have you. Rather than to throw that piece of glass away and take a complete loss on it, they repackage these occasionally, and in most cases they package them in a plain white envelope with no manufacturer's name on it, and these become available to anybody who wants to buy them. Certainly these were purchased by Daltex. I don't say every lens in Daltes was of that quality. I am saying yes, some of them were purchased by Daltex.

- Q. Are these type seconds considerably cheaper than the first line quality lens blanks?
- A. Certainly.
- Q. Have there been any occasions in which Daltex bought old lenses or lenses that were lens blanks that were thinner than desirable or having some attribute that makes them normally unuseable for eyeglass lenses?
- A. I recall one instance in particular where glass was purchased from Hudson Titmus, who at that time was the president and owner of Titmus Optical Company, and it was towards the end of the year, and Hudson Titmus had advised the personnel at Daltex that he had so many hundreds or thousands of pairs of lenses that he needed to dispose of for tax purposes, he had to convert his inventory into cash. and we bought what was known as a job lot. We meaning Daltex, and I helped sort some of this mess that was bought. We had some lenses that I am sure must have been made twenty-five years ago that were so small the only way we could have possibly used them would have been in a pair of children's spectacles, per se. Some of these lenses were of tints that were no longer being made.

We had many many lenses that were of a multifocal variety that were for right eye only. We didn't have the matching half pair.

It gives you an example of what you get in a job lot. Yes, Daltex has purchased some job lots. This is one that I particular know of. Others I am not familiar with.

- Q. Because there was no restraint by the examining doctor against the use of second quality lens blanks, was it more tempting for Daltex to use such kind of quality than if the doctor had had the ability to specify quality?
- A. The motivating factor here at Daltex became profit.
- Q. Not quality of the prescription?
- A. Quality was secondary. The offices took what Daltex sent to them, and if the prescription was absolutely beyond all realm of reason, then and only then would it be remade, but more often than not, if it didn't meet the specifications of the examining doctor, he would speak with some of the laboratory personnel, and they would say, "Well, why don't you try them, and if it doesn't work, then have the patient come back and we will make them another pair of glasses," or something of that nature.
- Q. Was quality also secondary to volume and profit in the local brach office of Lee Optical?
- A. No. I would say that the average optometrist that I was familiar with was interested in building a successful future for himself. He came into the organization under that premise. At the time that we were building an organization, I think we turned out a very fine quality product. It wasn't

until later that the quality of the product deteriorated.

- Q. When volume and profit became predominate?
- A. Became paramount, right, that's true.
- Q. Is that one of the reasons you severed your relationship with Dr. Carp?
- A. Yes. The primary reason that I severed my relationship with him was that I just couldn't live with the situation that was going on. It was a condition that I could not control, and it was going from what I consider a bad to a worse condition. I had to face these doctors, and I had to try to advise them, "Well, tomorrow things may be better," and so forth. Finally got to the point where I realized there was no betterment that I could perform, and so the best thing for me to do—
- Q. You are saying the doctors out of the branch offices would complain to you about the time pressures and the volume pressures they were under?
- A. Yes, and the quality of the workmanship that was coming back from the laboratory. They would complain to me on such a thing, "I need another girl in this office."

I would say, "Well, let me see what we can do on that. Do you have someone in mind?"

And they say, "Yes, I do. It's going to cost a hundred dollars a week for the services of this girl."

In discussing it with Dr. Carp and with Mr. Shaunbaum, Mr. Shaunbaum would usually say, "I know it can't be done," or if you went ahead -- and in my particular case I made a commitment to the

doctor that such and such and so and so would be done, it was not abnormal for him to countermand this decision without my knowledge of it. This happened on a couple of occasions, and when it did, I at that particular time decided, "Well, it's time that one of us has to leave."

- Q. Did these kind of restrictions and time pressures and volume pressures adversely affect the quality of eye care of the doctor of optometry in the local offices?
- A. I think so, and to the point that I say it very definitely goes far beyond that. Not only did it affect the quality of eye care at that particular time, I think that the organization has lost many competent individuals that there was no need for them to have lost had conditions been as they initially were.
- Q. When you say organization, you are talking about Lee Optical?
- A. I am talking about Lee Optical organization, yes.
- Q. In vernacular, were a lot of good doctors fed up?
- A. Yes.
- Q. Did they quit because of the time pressures?
- A. Yes. Some of them went with competitive organizations, and some of them went into practice for themselves. But regardless of where they went, they did leave. Any time when you have a change, a heavy change of personnel, you don't have a good organization.
- Q. Doctor, do you think that the time pressures and volume pressures of a commercial optometric

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practice inherently and adversely affect quality eye care?

- A. I think so, yes. No question about it.
- Q. Are the time pressures and volume pressures increased by the cost and the timing of advertising?
- A. Certainly. Somebody has got to pay for it, and the patient is going to be paying.
- Q. Doctor, do you think there is a place for advertising in opticianry provided there is full disclosure and accuracy?
- A. Yes, certainly.
- Q. So you are not personally opposed to some form of control or regulated advertising by opticians?
- A. Absolutely not. I am very much in favor of advertising.
- Q. Are you familiar with the Texas statutes on advertising?
- A. Yes, sir.
- Q. Are you familiar with the provisions requiring full disclosure and accuracy and the threat of suspension or cancellation if there are violations of those standards?
- A. Yes, I am familiar with them.
- Q. Do you think it is a workable statute?
- A. Extremely so.
- Q. Do you think it is of benefit to the consumer?
- A. Yes.

- Q. Do you think the consumer would have less protection if by some means the statute was stricken either by legislative repeal or FTC ban?
- A. Yes, definitely.
- Q. I would like to discuss with you for a moment, Doctor, the subject of inherent dangers in advertising eyeglasses. Is advertising eyeglasses like advertising a pair of shoes for sale?
- A. No, I wouldn't say so. A pair of shoes, at least you can see what you are getting. With a pair of glasses, you can't. You are getting an item that the average consumer is not familiar with.
- Q. Is the optical product, namely eyeglasses, a non-standardized type commodity?
- A. What is the meaning of non-standardized?
- Q. In other words, different lens categories, things that have qualities that the consumer cannot detect by his own examination.
- A. Yes.
- Q. Are those two qualities, namely the difference in categories and qualities that cannot be seen or detected by the consumer, what sets apart eyeglasses from many different types of advertised products?
- A. Yes.
- Q. Would the public normally be aware that differences in eyeglass quality and eyeglass cost could be caused by differences in quality of lens blanks?
- A. Yes.

- Q. Or plastic versus glass lenses?
- A. Possibly there, but, again, it's probable.
- Q. Or transmission qualities such as color tint, color distortion?
- A. It's questionable, again. The average individual buying a pair of glasses doesn't specify to you that they want a particular quality of lens. They just assume they are going to be given a top quality item just as if they went to the pharmacist and they asked for a prescription to be compounded, they wouldn't ask for a second quality drug, they would assume that it's going to be of a top quality thing. In pharmacy you have the Federal Drug Administration overseeing the manufacturing of your drugs. In the optical industry the supplier is the one who controls the quality of the finished product. If a doctor per se orders a product made by a particular company, he has ways of determining as to whether or not that lens has been made by that company, or he can look at a frame and determine as to whether it's the frame that has been made by the manufacturer that he has specified, but these are unknowns to the consumer, and the word "first quality" meant nothing in many states. Here in Texas we have -- I think the Optometry Board is to be congratulated in specifying that there are certain standards that one must use in specifying quality. I think if we have something of this nature. there is no problem.
- Q. One advertising price --
- A. Yes.
- Q. is the Z.80?
- A. This is what I am referring to. If we had some

- specified control throughout the country, I think that the patients would not be bilked.
- Q. In view of all these variables and differences and lack of uniformities, how meaningful is it to advertise a single vision pair of glasses for fourteen ninety-five?
- A. It's the means of getting an individual into your office door that you might not be able to have gotten in otherwise. That's what it means to that particular individual who owns that operation.
- Q. Then it's meaningful as a means of getting them into the office, but is it meaningful by way of educating the public on all these variables and what they are really getting for their dollars?
- A. No. It doesn't mean a thing. In my opinion it doesn't mean a thing.
- Q. Now, Doctor, if there is advertising by the optometrist himself, assuming that the optometrist is his own boss and owns completely his own practice, does that advertising result in increased overhead costs?
- A. Yes.
- Q. In order to meet that increased cost, must there be either an increase in his charges or an increase in his volume of patients?
- A. Yes, I would think so.
- Q. Then is it a fair conclusion that advertising will cause either one of those two pressures on the doctor, increased overhead or increased volume?
- A. Yes.

- Q. When there is pressure for volume, you get into the -do you get into the same kind of pressures that you have described as being on the optometrist practicing in the Lee Optical offices?
- A. Yes. We find ourselves in Arizona with offices that we were just opening, and we would set up advertising budgets, and it's conceivable that that office operated at a loss for -- it might be three months, might be six months, might be a shorter or longer period of time.
- Q. Let's talk for a moment about your departure from Texas and entry into Arizona.
- A. All right.
- Q. About what time did you terminate your relationship with Ellis Carp and the Texas offices of Lee Optical and the other names under which you went?
- A. It was either the latter part of 1956 or the early part of '57. I have forgotten the exact date that the termination of the partnership agreement took place, but it was at that particular time.
- Q. Did you totally sell out to Dr. Carp?
- A. Yes, I did. I sold all interest to Dr. Ellis Carp.
- Q. Then what did you do?
- A. I retired, and we moved to Arizona. I remained retired for approximately six months. I went back into the optical industry. I had indebtednesses due and owing to me from Dr. Carp, and in order to get these resolved without formality of lawsuits and other problems, I purchased from him the optical corporation that he had in Arizona, which consisted

of one office only and a name, and I agreed to take from him the remainder of money that was due and owing to me in merchandise over the ensuing, I believe it was, two years, whereby I could specify to him and to Daltex laboratories that merchandise that I wanted, and they would obtain it and send it to me. With that I went back into the optical industry, but this time as an optician. I built offices and operated them strictly as a non-price opticianry establishments.

- Q. Under what name and about how many offices?
- A. Under the name of Lee Optical of Arizona, Incorporated. At this particular time we had, I believe, four offices. When Mr. Shaunbaum and possibly Dr. Carp -- I don't know -- decided to engage in business in Arizona, they came in with a price policy, and when they came in with a price policy, many of us met their price programming with a price policy of our own. When I say many, I am speaking in terms of the other opticians out there. We found that with the advent of price advertising that we were able to increase our volume tremendously. We were able to get more and more patients into the office through price, and this is what we did, and price became an integral part of our operation. At the time when I sold it, they were still advertising price.
- Q. Were there optometrists employed in your Arizona offices?
- A. No, sir.
- Q. Were they next door?
- A. They could be located next door or could be located half a block away. They were convenient. Let me

- put it this way: They were convenient to our opticianry establishments, but not necessarily next door in all cases.
- Q. Did you have any employment agreements with these doctors or lease agreements or partnership agreements or this kind of thing?
- A. The only agreements that we ever had with the optometrists was that of a lessee/lessor arrangement, and in some cases we would obtain a lease for them and would lease that space to them, depending upon whether they had equipment or furniture -- depending upon whether we would furnish and equip the office. If we went to that extent, then naturally they paid more rent.
- Q. Were those doctors and did those doctors rely for the most part for patients via their physical proximity to your opticianry or referral from your opticianry?
- A. Yes. The Arizona statutes at that time were that when a patient asked you as an optician, "Where should I have my eyes examined," or what have you, you were bound and obligated to advise them of at least three doctors that were conveniently located to your establishment. I think the statutes were within five miles. This we would do and would say, "We have Doctor" so and so "located just two doors away. He has examined many of the patients for whom prescriptions we have filled, and apparently he's very competent."
- Q. So, in response to the advertisements, the people would come to your opticianry?
- A. Yes.
- Q. Of course, you could not fill a prescription unless they had been examined first, correct?

- A. We could fill a prescription only in the event they had a prescription. If they had a pair of glasses and they wanted a duplication of those glasses, we could do that. They did not have to have their eyes reexamined in order for us to make another pair of glasses for them, but assuming, now, that you have a patient coming if off the street that wishes to have their eyes examined, then we would have to have a prescription given to us before we could fill them.
- Q. As a part of your lease agreements with the nearby optometrists or your equipment rental agreements, to what extent did you control their method of practice or their office procedures or the general conduct of their optometry?

MR. KEITH: Larry, I object to the question unless it has some relevance to the issues in this case. If it does, I am perfectly content to going on into the night. What occurred in Arizona I don't see has any relevance to the Texas Act or is under challenge here.

MR. NIEMANN: Are you through with your objection?

MR. KEITH: Yes, sir, I am. I think it's unfair to the Court or parties to drag it out unless it has some connection with this case.

MR. NIEMANN: The relevance is that it is entirely possible that the same type of operation can occur in Texas under the Texas statutes, and I am inquiring about the nature of his Arizona operation because it could legally under the statutes in Texas be repeated in Texas, and because of that relevancy, I ask you to answer the question.

MR. KEITH: I object because I have no idea what

the Arizona law is, but I don't believe it's like the Texas law.

THE WITNESS: We did not control the mode of practice of the optometrists other than to specify in our leasing agreement with him the hours that he was to maintain the office to be opened, the days of the week. That was the only --

- Q. As a practical matter, do any of the doctors with whom you had lease agreements exclusively practice by the appointment method?
- A. Many of them tried to, and on the slower days they could, but on Saturday, they did not carry appointments.
- Q. Are you then saying that if the doctor of optometry relied indirectly for patients through the advertising of the optician, then there was a certain mode of practice that was dictated?
- A. Yes. Indirectly, yes.
- Q. The waiting line type method?
- A. Yes.
- Q. And the high volume practice?
- A. Yes, sir.
- Q. Then did some of the disadvantages -- did some of the time pressures and high volume pressures that existed in the Lee Optical practice in Texas, were some of those repeated in Arizona, not by you, but by the doctors that were nearby?
- A. On occasion, yes, we would have a patient, say, "Gee, I have never had my eyes examined in such a

hurry," or such things as that. We would say to them that, "Well, he has examined a number of people whom we have served, and apparently he is very competent. If you are experiencing difficulty with your glasses at a later date, don't hesitate to let us know or call him and I am sure he will take care of it."

You try to make some kind of amends, even though you weren't directly involved. You were indirectly involved because in a sense you had recommended this doctor as being one of three or four to that individual.

- Q. Are you familiar with a Dr. Shropshire?
- A. Yes, sir.
- Q. What is his full name and what is his relationship to Lee Optical now?
- A. Charles T. Shropshire is the full name, and I believe he is in charge of acquiring optometrists and leasing offices in Texas.
- Q. To your knowledge was Dr. Shropshire associated in some manner with Lee Optical in 1961?
- A. To the best of my knowledge Dr. Shropshire has been with Lee Optical since 1946 or 1947. I have never known of him to be with any association other than with Lee Optical. At one time he had a partnership with Dr. Carp in an office in Amarillo, and that office was canceled, and then he became an employee of Dr. Carp.
- Q. During your association with Dr. Carp and Dr. Shropshire at Lee Optical, do you ever recall instructions from the home office to the doctors in the branch offices regarding prescriptions or

certain kinds of lenses which they could or could not prescribe because of inventory problems of the home office or the laboratory?

- A. I recall of requests. I don't know whether they were all in writing, but word was given to these doctors to attempt to prescribe lenses of certain tints because Daltex had an overabundancy of them. I also recall of notices going out, and again I don't recall whether they were all in writing, pertaining to frames, that there was overabundancy of this particular styling or coloring of frame, and to do all in their power to attempt to dispense them. In particular I am referring to some Toura frames -- very good. I recall those.
- Q. Do you ever recall instructions issued by Dr. Shropshire or Dr. Elless similar to the following instructions: "Trifocals, executive bifocals, lenticulars, etcetera, should not be prescribed or fitted even if a patient is willing to pay more for such. Do not charge more than the advertised price under any circumstance."
- A. I don't recall any notice of that nature going out, no.
- Q. Do you recall any other instances in which the home office would attempt to steer a doctor toward or away from certain kinds or categories of lenses?
- A. Yes. As the organization built, we developed a chain of command. Primarily my role within the organization dealt in personnel. Dr. Pearle was primarily in advertising. Dr. Carp remained at the home office, and Mr. Shaunbaum handled general matters of business.

As our development occurred, we developed individuals or acquired individuals who became area supervisors, and these area supervisors were all optometrists and were brought in periodically to the home office, and at such time were advised that the laboratory had made a special purchase of such and such, and that they were to get out into their offices and attempt to stimulate sales on those items in particular.

If any change in policy was to take place, such as giving an added bonus for the selling of a particular styling of frame, more often as not, it would occur at the supervisory meetings, so when the supervisor left that home office and went back to the offices under his control, he was then able to correspond with the doctors in that office or doctor, as the case may be, and say, "This is what took place when I was at Dallas. Effective as of today we are going to give everyone in the office a twenty-five cent bonus when they sell a frame of this particular color, style or manufacture until our supply is exhausted. In addition, you are to do all in your power to dispense a particular color or style of lens."

The only thing that I recall in terms of lenses vividly is that we were experiencing difficulty making the executive — making a prescription in the executive bifocal, and we were having tremendous breakages with the laboratory. At one of the supervisory meetings, it was asked of the supervisors to advise the doctors under their jurisdiction to curtail the recommendation of the utilization of the executive bifocal, but I don't ever recall the order coming out and saying, "Don't accept it or don't prescribe it."

Q. Doctor, on the basis of your previous experience as an owner of an optical chain with and without employed optometrists and on the basis of your familiarity with the Texas optometry advertising statutes, do you have an opinion concerning whether the Texas advertising statute increases the quality of eye care by the opticians and optometrists that advertise?

- A. I very definitely feel that the optometry law benefits the patient in this regard, yes.
- Q. Does the law which forces full disclosure and accuracy and which has the enforcement powers that speak for themselves, tend to upgrade the quality of eye care by those opticians who advertise and those optometrists who either advertise or gain their patients through the opticians advertising?
- A. Mr. Niemann, I don't know about the quality of eye care because the optician can't provide eye care, but he can provide an eye quality to a pair of glasses.
- Q. That's what I am referring to.
- A. Is that what you are referring to? Yes, I think the overall statute in Texas is one that would be well to be adopted throughout the entire country. I think it's an excellent statute.
- Q. Instead of combining both in the same question, let me re-ask the question. Does the Texas statute tend to upgrade the quality of ophthalmic materials or lens prescriptions dispensed by opticians who advertise?
- A. Yes, sir. Yes, sir.
- Q. Does it similarly upgrade the quality of eye care rendered by optometrists who may advertise or by optometrists who are somehow benefiting from the advertising of associated opticians?
- A. Well, I would think so. My personal opinion, I don't

know of any optometrists that are advertising, but if they did, I assume they would come in under the statute, but for the ones I know of, I think they are all quality conscious, and having these standards set forth, looking at it as a former owner of a wholesale establishment, it is ridiculous for me to carry two inventories of glass, one a top quality and one of a substandard quality when I know I can only use one quality in filling a prescription for a Texas licensee.

- Q. Therefore, quality increases?
- A. Therefore, quality is going to be bettered. There is no question about it.
- Q. Do you know of any harm that the consumer suffers by virtue of the full disclosure and accuracy requirements of the Texas advertising statute?
- A. No.
- Q. Is the consumer better educated regarding the different categories of lenses if price advertising is done via the requirements of the Texas advertising statute?
- A. I would think so.
- Q. Does the advertising statute in Texas prevent the consumer from being tricked or lured into the opticianry assuming that he can get the glasses for a specified lower price?

MR. KEITH: I object to the question as calling for a statement of the law.

MS. PRENGLER: What was the question?

MR. KEITH: Does advertising prevent consumers from being tricked by essentially bait

advertising?

THE WITNESS: That isn't how he worded it.

MR. NIEMANN: Even if I asked that, I may still ask it.

COURT REPORTER: "Question: Does the advertising statute in Texas prevent the consumer from being tricked or lured into the opticianry assuming that he can get the glasses for a specified lower price?"

MR. NIEMANN: I still ask the question.

A. As I understand the statute --

MR. KEITH: That's my objection, that it calls for a construction of the statute.

MR. NIEMANN: I am not asking for a legal construction of the statute, counsel. I am asking for a practical effect of the statute from one who knows how a commercial opticianry operates and what the public's reaction is to advertising on the basis of use of experience.

Please go ahead and answer the question.

A. Yes, I understand the Statute. An optician that advertises must post his advertising price, his advertised prices with the Optometry Board, get an advertising permit from the Optometry Board before he can ever advertise, and then when he does

MR. KEITH: Price.

- Q. Price?
- A. Yes. I am speaking of price now. Once this price

advertising does take effect, he must have these prices that he has given to the Optometry Board posted within his office so that his clients are able to readily identify the price quoted to a product.

- Q. Well, I am speaking particularly to the part of the advertising statute which requires that in any advertising of price, that the price for all the statutory lens categories be listed, to-wit: Single vision, kryptok bifocal, regular bifocal, trifocal, aphakic, prism, double segment bifocal, subnormal vision and contact lenses?
- A. What was your question?
- Q. Will the required listing of those categories and the prices for those categories in any advertising have the practical effect of better informing the consumer of what he is in for when he goes into an optical office?
- A. Yes, it certainly is a lot better than just advertising glasses as low as thirteen eighty-five or whatever the price may be. At least you are specifying a definite type of spectacle for a definite fee.
- Q. I am asking if the statute in your opinion has the practical effect of accomplishing the purpose of informing the public.
- A. I believe it does, yes. I think that the public can at least be informed that one type of spectacle will cost so much if they have a single vision lens. If it's going to be a bifocal of a particular type, then they will pay more for it. Yes, I think that will inform them.
- Q. In the practice of optometry where the optometrist is his own boss and relies on his reputation for competence rather than advertising as a source of patients, does the optometrist serve as a buffer

against the mistakes of the optical laboratory?

- A. Certainly. It's his responsibility to examine each pair of glasses that come into his office and to determine whether they meet his specifications.
- Q. Is this protection or buffer for the consumer's protection diminished when that optometrist becomes under the employ of the opticianry furnishing and fabricating the lenses?
- A. I think so. In many cases what occurs with a prescription that I or any other optometrist can write, we give to the patient and we advise them, "Get this prescription filled wherever you may, and prior to wearing them, please bring them back to our office for verification."

There is no way we can demand that patient to come back, so, therefore, we have no control over the quality or the manufacture of how well or how poorly the product was made.

Q. The point I am getting at, if the opticianry that is locked into a laboratory or which is owned by a laboratory, if they are the source of the optometrist's patients, isn't that optometrist more relunctant to act as a buffer against the mistakes of the opticianry or the wholesale laboratory?

MR. KEITH: Purely speculative, and I object for that reason.

- Q. State your answer on the basis of your history as an owner of an opticianry and your close association with an optical laboratory.
- A. I would say yes, that he would be more relunctant to act as a buffer, certainly.

MR. NIEMANN: That's all the questions I have for the moment.

MS. PRENGLER: I only have a few.

## EXAMINATION BY MS. PRENGLER:

- Q. Dr. Shannon, when you came back from Arizona to come to Texas, did you have any job offers or job opportunities at that time?
- A. Yes.
- Q. Will you tell us about them?
- A. Many of them.
- Q. The types of job offers that you had?
- A. Well, I had a number of opportunities to go to work with salaries as much as thirty thousand dollars offered to me.
- Q. Did you have a job offer from Dr. Rogers?
- A. Yes.
- Q. Did you accept that offer?
- A. No.
- Q. Why not?
- A. Well, at the time I truthfully didn't know what I wanted to do. I had two, I believe, telephone conversations with Dr. Rogers which were very pleasant, renewing our friendship and so forth. He spoke in terms of what did I want to do, and I said, "Truthfully I don't know what I want to do."

He said, "Well, how would you like to do some vacation relief work?"

I said, "Well, that sounds interesting. I will certainly think about it."

I was thinking about it, and I received a telephone call from one of his representatives by the name of Dr. Charles McClintock. When this telephone call came in, that stopped all of my future thoughts in terms of any association I might have with Dr. Rogers, vacation relief work or anything else. I wanted no part of his organization with Dr. McClintock. A shorter period of time thereafter, possibly within a week or thereabouts, I purchased the practice of Dr. John Herrin at Richardson.

- Q. Throughout the years how would you classify your relationship with Dr. Rogers; has it been hostile or friendly?
- A. Oh, it's been friendly. I have no animosity towards him, and I know of none that he has towards me.
- Q. Dr. Shannon, as an optometrist, what problems or interests do you expect the members of the Texas Optometry Board to be concerned with? What types of problems do you think as a Board they should be concerned with and interest in the sense of public interest or private interest?
- A. First and foremost, I think a State Board member has a prime duty to examine candidates and to pass those that they feel are successful in completing their requirements for licensing. That's number one.

Number two, I think their role is to uphold the enforcement of the Optometry Act to the best of

their abilities, and it is there that I think their duty should stop.

- Q. Could you sort of briefly tell what type of qualities that you think a Board member whould have just as a person, to be a good Board member?
- A. Well, I think he should be a non-biased individual and have no prejudices toward any race, color or creed. I think he should be learned certainly in that aspect of work that he is performing as a State Board member. Certainly should be extremely knowledgeable of the statutes and as an examiner of a particular phase of the examination, he certainly should be one of the leading educators or advocates of knowledge in that field. I feel that he should hold no powers beyond that which have been granted to him by the governor and through the Senate, his appointment.
- Q. Do you think that he should put the interest of the public before any private interest that he may have?
- A. Without a question, certainly. He is, as far as I am concerned, a servant of the public.
- Q. Okay. Keeping all that in mind that you have just stated, do you have an opinion as to whether or not you personally would make a better Board member now as opposed to when you were part owner in Lee Optical?
- A. There's no question but what if the opportunity were presented to me and I wished to accept it, that I would be a far better State Board member today than what I would have been twenty years or more ago because now the interest that I have would be strictly for optometry and for the public, where twenty years ago I would have been interested in

- trying to get men through the State Board, possibly become employees of mine, and I would have had my business interest probably foremost.
- Q. And the temptation to take advantage of that would have been greater then than any sort of temptation at the present time, since you are self-employed?
- A. No question about it, sure.
- Q. If an optometrist who was in your employment at the time that you were part owner in Lee Optical were on the Texas Optometry Board, would you expect that person to look out for the interest of Lee Optical?
- A. You bet.
- Q. If that person who was in your employment voted against what you considered to be the best interest of Lee Optical, what would you do about it?
- A. I would have a very frank talk with him and try to advise him of what side of the bread he puts the butter on because, in essence, I am paying his salary.
- Q. If he didn't eventually come around to what you considered was voting for the best interest of Lee Optical, what would you do; would you fire him?
- A. I am sure I probably would, yes.
- Q. Okay, you talked to --
- A. Let me -- if I didn't fire him, I would make it very unpleasant for him so that he would terminate.
- Q. You talked earlier about some of the instances of price advertising that you personally knew about

before you left to go to Arizona. Can you go into a little more detail about the different methods that were used to advertise price?

A. Primarily we used three media. We used initially newspaper heavily, and we supplemented it with radio spots. When television came in, we then augmented our programming into some television. As television became more accepted, the trend changed from newspaper advertising into more television advertising, and it finally got to the point where we were using no radio at all and were using telephone -- I mean television and newspaper exclusively.

In all cases we advertised price and we advertised glasses "as low as", and it could be nine fifty, it could be ten fifty, whatever the pricing might be. The pricing was set in terms of what was our competition doing in that particular area, and we attempted to set our advertising at a lower price than what our competition was advertising at.

If we didn't have any competition that was advertising price, we then would use our basic format, which might be the advertising pricing that was used in Dallas. We also used credit. We would advertise "use your credit," or "convenient credit terms; pay as little as a dollar a week."

In all cases the glasses were advertised "as low as." In the very latter stages of the time when I was associated with Lee Optical, Dr. Luck's operation was purchased, and our advertising was modified for that, and it became a one-price operation. So, other than that, it was all "as low as."

In many cases, to stimulate people to come into an office when we were opening an office, or if the

volume wasn't up to our expectations, we would give gifts. "Get a pair of glasses and you get a free set of dishes," or you would be given a slip that entitled you to have a free photograph, you and your family, some type of inducement, in addition to just coming into our office because of price alone.

- Q. Did you ever use any type of leafletting, coupons, anything along that line to get people?
- A. Yes, we sure did. We had leaflets printed. I vividly recall in Texarkana that stated in effect that this leaflet was worth three dollars. If you took it to your office, this would entitle you to a free eye examination. If you didn't need glasses, it wouldn't cost you anything at all. You would give them this leaflet.
- Q. What would happen when the people would come in with these coupons; were they redeemed, and did you follow up on what you had promised?
- A. Yes, we sure did. In essence, what it boiled down to is that we gave a free eye examination. There are very few people, as I recall it, that weren't prescribed to.
- Q. Do you personally know of any situation when you were with Lee Optical when there was a particular optometrist who regularly did not prescribe glasses who was called down about it?
- A. Yes, I do. The word "called down," though is not correct. He was spoken to and was told that we just couldn't understand how he could examine so many people and not prescribe, that the percentage of not prescribing from his office was far far in excess of what the average was in all other offices, and at that time we would have a frank discussion with that

- doctor, and usually it would cause the volume of that office to increase after we had spoken with him.
- Q. Do you know about what percentage of people who came to Lee Optical during the time there was price advertising actually paid the price for the glasses that was advertised or drew them into that particular office?
- A. About two percent of them, as I recall. About two percent of our total volume of sales were at our advertised price.
- Q. Is that just a guess on your part?
- A. No. These are figures that I recall.
- Q. Would you go over real briefly again the reasons why you decided to sell out your interest in Lee Optical?
- A. In my personal case, I just felt that an element of degradation was taking place that I could not control. I had made promises to these doctors and to personnel, and finding that my word was being countermanded, I had a situation that was most unpleasant, and I was not able to correct it. It was necessary that one of two things take place, either that I buy Dr. Carp out or Dr. Carp were to buy me out. It so happened that he bought my interest.
- Q. Did you discuss these problems and the degradation that you felt was taking place with the other two owners?
- A. Yes, with Dr. Carp and Dr. Pearle, certainly. In fact, Dr. Pearle left the organization at the same time or very close thereto to the time that I left the organization.

- Q. What was your impression as to their attitude concerning these problems and their attitude toward your complaining about these problems?
- A. Dr. Pearle's attitude was one that he was very much in sympathy with me and felt that I was correct in my judgment. Dr. Carp's attitude was one that, "Well, let's not get too upset. Things will be better later," and things did not become better later. So Dr. Pearle and I both severed our partnerships at about the same time.

There may be a difference of a few days to as much as maybe a month, but we both left the organization within the same period of time.

- Q. You may have stated this earlier, but I just wanted to make it clear. At the time you left for Arizona, were you personally in favor of no restrictions on price advertising?
- A. Very much so.
- Q. Why was that?
- A. Because I felt any restrictive measures that took place, whether it be on advertising or anything else, would serve as a detriment. We had a building organization, and it's common knowledge I openly fought passage of legislation in Austin that would have in my personal opinion at that time, had it passed, would have hurt my organization.
- Q. Would it be accurate to say that you have done a complete turnaround now in your personal feelings?
- A. Yes. No question about it.
- Q. Why is that?

- A. I mitially when I went into optometry and when I practiced optometry in Massachusetts did not practice as a commercial practitioner, if you want to use that word. I did not advertise price. I didn't believe in price advertising. I went into price advertising in Texas not because I particularly wanted to, but because I needed to put food on the table. I spoke with Dr. Rogers and his brother over in Fort Worth one evening about employment. which you may or may not remember. Dr. Rogers. and I just felt that if this is the way it had to be, it had to be. In those days, many many men were practicing in jewelry stores. This was something that had been the mode in Massachusetts, but had been legislated so that the pratitioners there did not advertise price when I was there. They did not practice in jewelry stores, and I wasn't acquainted with that type of practice. But in order to make a living, I had to.
- Q. Do you know whether or not Lee Optical is still owned by Dr. Ellis Carp now?
- A. No. I don't know that for certain.
- Q. You don't know, so you don't know who owns it?
- A. No. I don't.
- Q. Do you know who owns Daltex Laboratory?
- A. No. I don't know.

MS. PRENGLER: That's all.

A. For certain, I don't.

MS. PRENGLER: That's all the questions I have.

## **EXAMINATION BY MR. KEITH:**

- Q. Dr. Shannon, you support price advertising so long as it is fairly done and done in a way that assures the patient actually receives what is advertised?
- A. Yes.
- Q. You think that such advertising with proper constraints advances the interest of the patient?
- A. The interest of the patient? You better phrase it again. I don't understand you.
- Q. The patient is better off on account of having the benefit of legitimate advertising?
- A. Let me put it this way. I feel that I have no objections to price advertising provided there are restraints so that the patient is not going to be bilked.
- Q. Let's call that legitimate advertising.
- A. All right.
- Q. Then you think that is in the best interest of the patient?
- A. No, I don't say that is in the best interest of the patient, but I say I have no objections to price advertising. If advertising is to be, I have no objections to price advertising provided that the patient is not taken advantge of by false or misleading forms of bait advertising, which have occured in the past. I also feel that the patient should have a quality control placed upon the maker of the glasses or the dispenser of the glasses so that they are not going to be bilked in terms of quality. That's why I say I think the Texas statute as it reads now is an excellent one.

- Q. Now, do you feel the same way, whether that advertising is by optician or by optometrist?
- A. No, I do not. I feel that glasses are strictly a commodity, and as such, should be advertised not by a professional, but by a merchant.
- Q. Why if an optometrist is selling this commodity do you oppose his advertising its price fairly?
- A. I don't consider that he is selling a product. I consider that the product is part of the overall services that the optometrist is rendering to a patient, and that his fee for the services of the ophthalmic goods is but a small part of the overall fee charged to the patient.
- Q. What then is your objection to the advertisement legitimately of the fee for services rendered by an optometrist?
- I don't know how in the world you can come up with an answer to that.
- Q. Why isn't the patient entitled to the information as to what the normal fee for an eye examination is by a professional man?
- A. I have no way of knowing what a normal fee is, no more than I have of knowing what a normal examination is.
- Q. Do you have a standard and customary fee for an eye examination?
- A. No, I do not. I have a minimum fee.
- Q. What would be wrong with your advertising legitimately that minimum fee?
- A. I don't believe in it because I can't give that

minimum fee to all patients.

- Q. Do you have any other reason?
- A. I just feel that it's wrong for a professional man to advertise a price. I have nothing against him advertising provided that it's not something that he's putting into a marketplace. I didn't go through college to become a merchant. I was one, not because I wanted to be, but through economic necessity.
- Q. What other reasons do you have for opposing the advertisement of professional services, legitimate advertising of professional services?
- A. What other objections do I have?
- Q. Other than --
- A. To legitimate advertising by a professionalist?
- Q. With respect to his fee for services rendered?
- A. I don't feel that a professionalist, lawyer, physician or anyone else can truthfully and honestly without any equivocations tell everybody that they are advertising to, that "this is my fee."

Let me ask you a question. Would you as an attorney advertise for twenty-five dollars that you will grant a divorce fee, that your fee for a divorce is twenty-five dollars?

- Q. I am not going to get into a diatribe. I may say to you that I do not customarily obtain divorces, and my divorce experience has been that I would not normally obtain one for twenty-five dollars.
- A. Thank you, sir.

- Q. If a legitimate optometrist practicing his profession in accordance with the law desire to establish a set fee for examination, whether it's of a child or an adult or for contacts or bifocals or whatever, what opposition do you have and what reasons do you have which would oppose his advertising that fee which he chooses to set?
- A. Go ahead.
- Q. Which he will choose to charge the patient?
- A. Again, I do not feel that the services that a professional man grants to a patient should be advertised because I don't know that he can truthfully and honestly perform that services for that fee that he is advertising in all cases.
- Q. Assume that he can. Assume that he says all children's examinations under twelve years old will be ten dollars regardless of the complexity of the examination. He fairly charges ten dollars for that exam. Then what opposition do you have to his advertising that price?
- A. I feel that he is degrading the profession, whatever the profession.
- Q. Whether it's law, medicine or dentistry?
- A. I secondly feel that the quality of professionalists will suffer at the college level.
- Q. What do you mean by that?
- A. I don't know that you are going to be able to attract as good a quality individual to become that doctor, whether he be a doctor of law or doctor of medicine, when you have open advertising.

- Q. Have you observed any study that would support that opinion?
- A. No, sir, I have not. You have asked me for an opinion, and I have given it to you.
- Q. Do you have any factual basis for it other than just your own --
- A. Common sense?
- Q. Yes.
- A. No, sir. I have only common sense.
- Q. Did you purchase a practice at Richardson, did I understand?
- A. Yes, sir.
- Q. And the man had practiced there for some period of time, and you paid some type of money to acquire that practice?
- A. Yes, sir. I paid American dollars.
- Q. What did you acquire when you purchased that practice?
- A. All of the equipment, all the fixtures, all the furnishings and all the records.
- Q. Patient records?
- A. Yes, sir.
- Q. Did you value those items such as you put a certain value on the funiture and fixtures and a certain value on the leasehold improvements and a certain value on the records?
- A. Everything except the records.

- Q. Did you pay more than just the prescribed value of the furniture and fixtures and leasehold improvements?
- A. I don't believe I did.
- Q. Did you pay anything at all for the records?
- A. No, sir.
- Q. Do the records have any value?
- A. It's questionable. They may have.
- Q. Do patients return to that office for examination who had previously been examined or refracted at that office?
- A. Yes, sir.
- Q. Do you derive some benefit from those reexaminations or repeat examinations?
- A. Benefit in what manner?
- Q. As a professional man, do you attract, realize some clientele from that source?
- A. Yes.
- Q. Had you ever lived at Richardson prior to your acquisition of this practice?
- A. No, I have not. I beg your pardon. I lived there six months.
- Q. But had you engaged in any optometric practice at Richardson?
- A. No, sir.
- Q. And you do not live there now?

- A. No, I do not.
- Q. How long have you lived in Bridgeport?
- A. I believe it was October 10th of 1975 that I moved there.
- Q. Prior to that you lived where, at Richardson?
- A. At Richardson.
- Q. Then having bought and operated that practice for several years, you then sold it?
- A. Yes, sir.
- Q. Did you sell it for more than you purchased it?
- A. No, sir, I did not.
- Q. The same thing?
- A. I sold it actually for less.
- Q. Did you sell the same equipment?
- A. I sold more equipment.
- Q. For less money?
- A. Yes, sir.
- Q. And retired from the practice of optometry?
- A. No. I won't say that I have retired entirely. I said for all practical purposes I have retired, and as I explained to Dr. Rogers earlier, I do see occasional patients. I am there on a consulting basis, but my desires are that I will back out of that practice in its entirety.
- Q. Do you have some contract to stay there a certain number of months or weeks or years?

- A. No, sir, I do not.
- Q. Is it a two-man office?
- A. When I am there it is, yes.
- Q. Is your name on the door?
- A. Yes, it is.
- Q. What is the name of the firm?
- A. There is no firm.
- Q. Are you an independent practitioner, that is, you and this fellow Sparks have no partnership?
- A. That is correct. All monies that come into that office go to Dr. Sparks. I receive nothing for the services that I render to that office or to him.
- Q. What about if you examine a patient and prescribe a set of contact lens; do you realize anything from it?
- A. I realize nothing.
- Q. Whether you do or do not work, you don't get any money?
- A. That is correct.
- Q. Do I understand --
- A. I beg your pardon. This has been that way since September 1 of 1975. So this is not something that occurred yesterday or the day before.
- Q. Do I understand that it was your opinion that advertising of services leads to a high volume of practice?
- A. No. Advertising of merchandise.

- Q. Leads to a high volume of practice by associated optometrists? Is that what Mr. Niemann asked you?
- A. It has worked that way, it sure has.
- Q. And that a high volume practice by an optometrist is undesirable?
- A. No, I did not say that.
- Q. Well, what, then, is undesirable about advertising if it leads to a high volume practice?
- A. Of optometry or opticianry?
- Q. Optometry.
- A. Of optometry, I think much depends upon the amount of time that the individual optometrist is able to spend with the patient and the services that he is able to render to that patient. There is not a thing in the world against having a high volume optometric practice that is devoted exclusively to refracting, provided that the optometrist is able to give an honest and a true service to that patient.
- Q. So the mere fact that advertising may lead to a high volume practice is not in and of itself bad?
- A. No, sir. I am not saying that it is. I am not against advertising.
- Q. And not against a high volume practice if it is performed properly?
- A. That's correct.
- Q. Reputation can lead to a high volume of practice?
- A. Can it?

- Q. It can?
- A. Tell me where.
- Q. Certainly that's true in any other profession. It's not true --
- A. Is it true with Dr. Rogers?
- Q. Is it true in your profession, a reputation will not affect your volume of practice?
- A. Certainly it will, but it will not lead to a high volume of practice.
- Q. What is a high volume?
- A. That's what I am asking you.
- Q. You used that term throughout your direct examination. What did you mean when you used the term?
- A. Anything over half a million a year.
- Q. Is a high volume practice?
- A. I would consider so.
- Q. You are talking about a half million dollars a year in gross fees?
- A. Yes, sir, gross volume.
- Q. Fees by an optometrist?
- A. No. I am speaking in terms of total sales.
- Q. Of what?
- A. Of an office, of a dispensary or an optometric office.

- Q. Wherein both examination is performed and product is dispensed?
- A. If it's an optometric office, then the answer would be yes; if it's strictly a merchandise that is being sold, it would be an opticianry office, and we felt and I feel that any office that does in excess of half a million dollars is a high volume practice.
- Q. All right. Now, is any office that does as much as half a million dollars a year necessarily bad in your view?
- A. Bad?
- Q. Yes.
- A. What do you mean bad?
- Q. Is there some consequence that flows from that that will service the patients who seek attention at that office?
- A. Volume in itself is not the answer.
- Q. You might have six optometrists rendering that service?
- A. Or six opticians, depending upon whether you have an opticianry establishment.
- Q. Depending upon the nature of the facility?
- A. Certainly.
- Q. There is also in your profession, as well as the others, the advent of the para-professional, is there not?
- A. Yes.

- Q. And this can result in a wise and expeditious employment of professional time. The paraprofessional can be trained to assist the professional man in his provision of service?
- A. True.
- Q. And this is one way that each of the professions has attempted to provide greater care at a lesser cost?
- A. Possibly.
- Q. Is that true in your profession?
- A. On a limited scale it's true. I think more in medicine.
- Q. You mean you are not claiming the benefit of it?
- A. I haven't seen too many practical applications of it. You are asking me something that I know, and I am only telling you what I truly know.

# [123]

## FURTHER EXAMINATION BY MS. PRENGLER:

- Q. Dr. Shannon, when you were with Lee Optical and you had optometrists there, did each of them have their own examining room?
- A. Or rooms, yes.
- Q. How would they know when a patient had come in? For example, how would they know if a patient was waiting to be examined while they were examining another patient?
- A. No. They would have no way of knowing. The girl

would usually knock on the door and advise the doctor by using a code or in some cases say, "You have got another patient," or "You have got a number of patients waiting," some such thing as that.

- Q. But that would happen while they were examining one patient. They would have some sort of interruption to let them know that some other patient was waiting?
- A. Or it could conceivably occur as soon as they got finished with that one patient, she would say, "Doctor, you have got five more patients waiting."
- Q. But for the most part, did most of your optometrists stay pretty busy?
- A. Yes.
- Q. One more question. In the profession of optometry there are many tasks that a para-professional could perform. When you get down to examining eyes, is there anything that you can let someone else do who was not an optometrist?
- A. Yes.
- Q. What would that be?
- A. Oh, they could take blood pressure, for example, if they are qualified and trained properly by the optometrist. That would be one. In my office they do all the preliminary work. We give them a basic case history card, and they fill it out, put the name and address and so forth.
- Q. But in terms of actually examining the eyes?
- A. Examining the eyes, no. The only thing they do is

run a visual skill, and they do a color vision test.

MS. PRENGLER: That's all I have.

## FURTHER EXAMINATION BY MR. NIEMANN:

- Q. Doctor, I would like to turn your attention for the moment to advertising professional services that Mr. Keith discussed with you. If patients are gained through a reputation of confidence in contrast to advertising, does that encourage competence and quality of eye care?
- A. Yes. If the patients are gained by word of mouth advertising, I think it's far better than other forms of advertising.
- Q. The flip side of the coin, if the patients are gained for the most part by advertising price or otherwise, does that tend to deemphasize the importance of competency of the optometrist and the importance of quality of eye care?
- A. Yes. I would say there are three basics. One is that if an individual sees more patients, he is going to have to either increase the time that he keeps his office open, and for the same examination time, or if he keeps the same hours, he is going to have to cut short his examination.

Number two, the quality of the product will not be as good for the most part as it would be if he had unlimited time to give to the patient in terms of quality control and services that he personally might be able to render rather than having somebody else render.

Q. Such as verification of lenses?

A. Yes, fitting of the spectacles themselves, even to the insertion and fitting of a pair of contacts and so forth.

The third thing is that if he maintains the same fee scale and he sees more patients, he is either going to have to extend his period of time, and if he does that, then he finds himself in a point of diminishing returns. He is putting in longer and longer hours all the time. So the chances are he is going to cut corners any way that he can, and he is going to cause that individual to pay the advertising rate or whatever he has spent for advertising.

- Q. In short, the advertising has to be paid by higher prices or greater volume with shortened time devoted to the patient?
- A. That's the only logical way I can see it, regardless of what product you are selling.
- Q. Doctor, next I would like to discuss with you a moment the effect of price advertising before and after the advent of Shaunbaum's outfit coming to Arizona. As I recall, did you testify that approximately ninety-eight percent of your sales were at the non-advertised prices in Arizona?
- A. Yes. I think I said that that was true in Texas. In Arizona it was a similar figure. So the bulk of the patients paid more than our advertised price. That's what I am trying to say.
- Q. Before Dr. Shaunbaum's price advertising came to Arizona, you did not advertise price, is that correct?
- A. That's correct.

- Q. Simply advertising without price, without reference to price?
- A. Yes.
- Q. After you were forced into price advertising by the competition of Dr. Shaunbaum's operation in Arizona, what effect did that price advertising have on the ninety-eight percent of your sales that did not conform to the advertised prices?
- A. We increased our prices shortly after we started advertising price in the non-advertised price categories. A pair of glasses that we would have dispensed prior to price advertising at, we will say, sixteen dollars, were now increased to, we will say, seventeen dollars. So the patient actually paid more for the same product now that we were advertising price than what they had paid prior to it.
- Q. Was the reason, that you had to make up the deficits on the two percent?
- A. Yes. Well, the prime reason was that we had to pay the advertising bill, which was the increased cost of operation. They much prefer to go up the ladder. Nobody likes to go down the ladder, in my opinion. If you are accustomed to making a certain livelihood and now suddenly your practice is not as profitable as thas been for you, you are going to try to find out why and take whatever remedial measures are necessary to correct this thing. This was the procedure we followed in Arizona, is that we found that we got into a much greater advertising program after Mr. Shaunbaum had opened his operations in Arizona than what we had done prior to that time. Our advertising costs tripled, but our volume did not triple.

So, to offset this, we increased the prices of the services, products that we were selling.

- Q. Are you telling me that price advertising had the effect of increasing prices for ninety-eight percent of the people?
- A. Yes, that's exactly what I said, by a dollar in some cases and maybe two dollars in others.

MR. NIEMANN: No further questions.

## FURTHER EXAMINATION BY MR. KEITH:

- Q. Was there any other cost factor involved that led to your increased prices?
- A. Was there any other factors involved?
- Q. Cost factor involved that led to increased prices?
- A. No, nothing.
- Q. What year was this price increase?
- A. It started in, I would say, the latter part of 1958 or the early part of 1959.
- Q. The advertising?
- A. Sir?
- Q. The advertising?
- A. Of price.
- Q. Right. When did you impose the increase?
- A. I would say within a period of two months we received monthly financial profit and loss statements, and I believe it was after we had received our second profit and loss statement that

the increase in the retail price of spectacles --

- Q. I thought you testified earlier, Dr. Shannon, that you did not increase your prices, but continued to deliver the same service to the patient at the same price, but experienced a six percent decline in your net profit.
- A. That is absolutely right. For two months we sure did.
- Q. Then you raised the price?
- A. Yes, right.

MR. KEITH: That's all I have. Thank you.

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# APPENDIX VOLUME III

FILED
JUN 8 1978

#### IN THE

MICHAEL RODAK, JR., CLERK

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1977

No. 77-1163

E. RICHARD FRIEDMAN, O.D., et al.,

Appellants

VS.

N. J. ROGERS, O.D., et al.,

Appellees

No. 77-1164

N. J. ROGERS, O.D., et al.,

Appellants

VS.

E. RICHARD FRIEDMAN, OD., et al.,

Appellees

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION, INC., et al.,

Appellants

VS.

N. J. ROGERS, O.D., et al.,

Appellees

Appeals From The United States District Court For the Eastern District of Texas

No. 77-1163 Filed February 16, 1978

No. 77-1164 Filed February 16, 1978

No. 77-1186 Filed February 21, 1978

Probable Jurisdiction Noted April 17, 1978

## IN THE

## SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1163 No. 77-1164 No. 77-1186

Appeals from the United States District Court for the Eastern District of Texas

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## [In the United States District Court for the Eastern District of Texas]

## DEPOSITION OF DR. JAMES J. RILEY, JR.

[page 2]

#### DIRECT EXAMINATION

#### BY MR. NIEMANN:

- Q. Dr. Riley, will you please state your full name, address and occupation for the record.
- A. Dr. James J. Riley, Jr., 1709 San Antonio Street, Austin, Texas, 78701.
- Q. And are you a Doctor of Optometry?
- A. Yes, I am an optometrist, practiced in Austin, Texas since June of 1948.
- Q. Continuously, Doctor?
- A. Yes.
- Q. How long have you been a member of the Texas Optometric Association?
- A. I was a student member in when I studied optometry, and became a full which was in 1946 and '47, and became a full member when I was licensed in 1948.
- Q. Since that time, have you held any offices in the Texas Optometric Association?
- A. Yes. I was secretary treasurer of the Texas Optometric Association for approximately 10 years, and 1955 to '64 or something like that as Chairman of the Legal and Legislative Committee for

eight years, 1956 to 1964. First Vice-President of TOA in 1966, and President from 1967 to 1969. Served as Chairman of the Board from 1971 until 1973, and have been on the Executive Committee since that time.

MR. KEITH: Since 1973?

THE WITNESS: Right.

- Q. To expedite our conversation, Doctor, might I refer to the Texas Optometric Association as the TOA?
- A. That's fine.
- Q. All right. Would you again state when you were Legislative Chairman and when you were President?
- A. All right. I was Legislative Chairman from 1956 to 1964 and President from 1967 to 1969.
- Q. All right. During this last quarter of a century, Doctor, have you been active in the creation of the College of Optometry in Houston?
- A. Yes, my father-in-law and I both were, along with Dr. Nelson Waldman in Houston, probably the two or three most vigorous and outspoken proponents of establishing the College of Optometry in Texas. At that time, there was no college of optometry in the southwest United States. There was a definite need for it, but, in Texas, there was some objection to establishing a college because of the idea that it might produce a large volume of practitioners, and, therefore, be a problem economically for the then existing optometrists. So, we traveled the State and appeared at different

optometric meetings encouraging the optometrists generally, and particularly the members of the Texas Optometric Association, to support establishing a college.

- Q. And did they do so?
- A. Yes, and supported in two ways, in fact, and that was the important problem. We wanted it to be established at a college that was a State University. Now, the reason was that typically like well, in the case of medicine, where medicine started in a barber shop and then graduated to private schools of medicine, and then in the early 1900s, finally moved to college supported schools of medicine, dentistry followed the same pattern, and optometry followed the same pattern of starting with a commercial or nonprofessional background, and then moved to private colleges of optometry. And, in the 1930s to 1940s, the trend was to move both the education of optometrists to better qualified educational institutions, but particularly those that were not private, were university affiliated. And, particularly desirable was the State University affiliation because the State Universities were better qualified in the health care sciences, they had the facilities, the adequate libraries, the adequate faculty and research faculties and the biological sciences and so forth to properly equip someone in the health care field for the study of medicine, dentistry, optometry, so it was necessary that we not only establish one. but then if possible, we have a state supported university establish the college.
- Q. All right. Doctor, were you involved in the 1969 Optometry Act and its passage through the Texas Legislature?

- A. Yes.
- Q. Was that during the time you were President of TOA?
- A. Yes.
- Q. And were you intimately involved in the Special Committee of Senators and Optometrists that was appointed by the Governor to work out the legislative compromise?
- A. Yes, I was.
- Q. We want to come back to that in detail in a few moments, Doctor.

Could you tell us where your office is in the City of Austin and the general nature of your practice.

- A. My office is at 1709 San Antonio Street, which is four blocks from the edge of the University of Texas campus, and because of the location and also because I have an interest in it, I have a fairly large proportion of my patients that are University of Texas students.
- Q. From all over the State of Texas?
- A. Yes. Being, of course, the University of Texas not only students from all over the State of Texas, but literally from all over the United States and all over the world. It's an interesting aspect of my practice. I see patients literally from doctors of every description and every level of education and level of expertise that you would probably ordinarily not see in an optometric practice.
- Q. And among your patients, would your patients include those from what we have heretofore re-

ferred to as professional optometry in Texas as well as commercial optometry in Texas?

- A. Yes. In other words, being not only because most of the well, I am not sure of the percentage, but a large percentage of the students that I see as patients are students that are here temporarily, and they are coming in because of a problem. In other words, they remain a patient of the doctor that originally examined them and prescribed for them, and they would come into my office because of difficulties they have while they are away from home. So, I would be seeing patients from doctors both professional, commercial, medical, all kinds.
- Q. Is there a commercial optometry office such as T.S.O. or Lee Vision in the general University area?
- A. No.
- Q. Are you the very closest optometrist to the University of Texas campus?
- A. Yes.
- Q. And you have practiced at the same location for -
- A. Since June of 1948. Twenty-eight years.
- Q. Doctor, a few moments ago, we referred to the phrase "professional optometry and commercial optometry." For the record, I would like to discuss and clarify those phrases as you are using them in this deposition. Could you describe in your own words generally what you mean by professional optometry and those concepts or practices or philosophies that are embodied by professional optometry.

- A. Professional optometry is the term that we use to talk about the group of optometrists in this state whose first distinction is the fact that they are interested in the highest quality professional care, technical competence, properly equipped office, taking the necessary time to not only examine a patient adequately and properly, but to advise and counsel with them about any visual problems they have.
- Q. Is this emphasis on quality affected in any way by your mode of appointments or mode of examinations?
- A. Yes, the general rule for a professional optometrist would be that he would operate his practice on an appointment basis. In other words, the patient would not only have a specific hour but a specific length of time of reserved for them when they come to the office so that adequate time is provided for the examination of the patient plus the fact that drop-in patients or patients coming in at random or not there as a reason for not taking the time and not making the effort to do a complete and thorough examination.
- Q. How does this emphasis on quality relate to the means by which professional optometrists gain their patients?
- A. Well, since the main way that a professional optometrist could expect to be professionally competent and successful would be by referrals and by building over a period of time a reputation of adequate care, of honesty and integrity and so forth, then the emphasis would be to provide that kind of practice and service for the patients since there is no way for them to get a patient except by their reputation, by the excellence of their care.

- Q. You mean professional reputation and personal relationships and referrals is the exclusive way that professional optometrists gain their patients?
- A. Yes.
- Q. Does professional optometry rely on newspapers, television or radio or other media advertising to gain patients?
- A. They not only don't rely on that method of obtaining patients, they both their general information that is given at professional meetings, the code of ethics of the American Optometric Association and the Texas Optometric Association and Rules of Practice specifically prohibit their using this type of method for gaining patients.
- Q. All right, Doctor -
- A. So, they not only would not do it, they would be inclined to consider it an improper and unethical way to gain patients.
- Q. Doctor, generally speaking, do professional optometrists have direct or indirect tie-ins with opticianries next door to their practice?
- A. No, I said there are three basic ways you could describe a professional or ethical practitioner, and one is the besides the quality and competence of care would be the economic independence. The typical thing for a professional practitioner would be to be a solo practitioner or a practitioner with one associate, usually a partner, sometimes employed, seldom employed, I might say, to have no direct connection with a laboratory. They might have some facilities in their office for mounting or edging lenses or for assembling a prescription

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- Q. All right. Doctor, what is the relationship between professional optometry and continuing education?
- A. The third distinction, I think, that we can make about professional optometrists would be both as individuals, and through their State Association, they have a long history of support and encouragement of law enforcement, of legal and ethical control of the practice of optometry, and upgrading of the competence of optometrists and the level of optometric education. They were the moving force in the initial Optometry Act. They have continuously since the initial Optometry Act been one of the leading forces in bringing the Optometry Act up to date periodically with the evolution of optometry, with the evolution of health care generally, and with the change both in the professional and business concepts that have occurred since 1920 when the first Optometry Act was en-

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acted. They have demonstrated their concern for the improvement of optometric education as we've already mentioned by the establishment of the College of Optometry at the University of Houston. They also —

MR. KEITH: I object to the question. The answer is not responsive.

- Q. All right. I will ask you another question, Doctor. Has there been an emphasis by professional optometry on continuing education in your conventions and seminars?
- A. Yes. The optometric conventions and the local optometric societies have again a clear record of emphasis on continuing education at these meetings. We routinely have experts in the field of optometric education that attend the meetings and present an educational program during the time of the meetings. When the University of Houston College of Optometry was established, we asked them to also establish postgraduate education that could be brought away from the annual convention meeting, additional postgraduate education. both on the University campus where there would be special facilities for it, which would not be available at a convention meeting, and both at the society areas where people who were not able to come to a State convention for some reason would have the possibility of postgraduate education in their local area. And this has been done fairly regularly since the college was established.
- Q. Does professional optometry play any role in the passage of the recent State statute requiring continuing education for license renewal?

- A. Yes, the postgraduate education as a requirement for license renewal has been one of the legislative goals for our association since approximately 1967, in that general area. About the time I was president, it was set as one of the goals. Since that time, it's been continually one of the legislative goals. And in the 1969 session, the possibility of postgraduate education was part of the instructions that and information that was sent out to our members prior to the session starting. And, at meetings during the year of 1968 and '69, the possibility of postgraduate education being considered was mentioned —
- Q. Did TOA testify for the continuing education bills last year?
- A. Yes, they testified they appeared both before the House Committee on Health Resources and the Senate Appropriate Committee. And, in the House, they actually gave testimony on behalf of continuing education, and officially endorsed the bill. And, in the Senate, they were present, did not give testimony, but did officially indicate their endorsement for the bill.
- Q. All right. Doctor, you have been using the phrase "professional optometry" synonymously with the term "we." Are those two phrases, "we" and "professional optometry," are they also synonymous with the phrase "Texas Optometric Association"?
- A. Yes, a large percentage of the optometrists in Texas, the ones who have the same general three distinctions that I've talked about, are associated in an association that's called Texas Optometric Association.

- Q. Okay. Does TOA membership include only professional optometrists as members, at least those who are licensed optometrists?
- A. The members of the Texas Optometric Association by and large I am sure would agree with all the basic points that I have made and would be in agreement in support of it. Like any association, we certainly have members that support our goals and aims —

MR. KEITH: I object to the answer as not responsive, and it does not answer the question that was presented.

- Q. Doctor, is the membership in TOA generally limited to what you have described as professional optometrists?
- A. Yes.
- Q. Now, I would like to explore the phrase, "commercial optometry" as you're using it today, Dr. Riley. Could you briefly summarize what you think are the major concepts or characteristics of commercial optometry?
- A. The easiest way to tell you what my opinion and my understanding of the phrase would be would be simply to contrast it with a professional group; wherein, the professional group, we talk about first the emphasis on quality examination, competence of care, so forth; and generally in commercial optometry, there would not be as great an emphasis —
- Q. It's not to say commercial optometrists are incapable of rendering quality care or —
- A. Absolutely not.

- Q. or that they do not render quality care?
- A. Absolutely not. I make no statement about any individual commercial optometrists just as I made none about any individual professional optometrists. But, talking about the two groups and the way the terms are generally used, in general talking about the basic concept of what this would typically indicate the type of practice, the type of practitioner this would typically indicate is what I had in mind.
- Q. Well, is this characteristic of a lesser emphasis on quality related in any way to the speed or volume of the optometric practice and commercial optometry?
- A. Yes, commercial practice typically is based on the concept of a high-volume practice. A high-volume practice usually means that you work without appointments, that there is pressure to see that patient today because he may not be back if he waits and isn't seen. And, so, in the case of quality care, the likelihood, the possibility of a practitioner being in a position where he could easily take the extra time if necessary, extra time for consultation or examination, either one, would be less possible under those circumstances.
- Q. Could you say that the mode of appointments was different between professional and commercial optometrists?
- A. Yes, typically, commercial optometrists do not by appointment.
- Q. A waiting line method?
- A. Right.

- Q. Generally speaking, are there obvious relationships or physical proximities between the commercial optometrists and opticians?
- A. Yes, the commercial optometrist generally has some relationship with an optical concern, either direct or indirect where there is an influence and a control operated through the concern of the optometrist with his financial and economic dependence on the optical company or the optical manufacturer.
- MR. KEITH: I object to the question as calling for an answer which is obviously no more than a gross conclusion by the witness and has no relevance to any issue before the Court.
- MR. ARNETT: It seems to me the question and the answer have a large degree of relevance, and your objection seems to be aimed at the weight the Court should consider the evidence. Perhaps you should address that to the Court.
- MR. KEITH: Unless the witness can testify to facts, he cannot offer any value whatsoever to the record of this case. If they want to ask him about facts, I have no objection.
- MR. ARNETT: Whether or not it's the opinion that the statements offer relevant and useful evidence is something the Court will decide. We will have him testify to it here.
- MR. NIEMANN: I will be happy to go into the question in depth.
- Q. Dr. Riley, do you know a number of "commercial optometrists" in the State of Texas?
- A. Yes.

- Q. How many of those practice either next door or right in the immediate vicinity of an opticianry, such as T.S.O. or Lee Vision, One Price Optical or Look Optical?
- A. Since I have lived in a fairly large city and lived in San Antonio and been a visitor and so forth generally in major larger cities of Texas, most of the commercial optometrists that I've been in contact with or have seen or observed and so forth over a period of the last 20 years have been commercial optometrists that have worked in establishment of Texas State Optical or Lee Optical.
- Q. When you say "most," do you mean 50 percent, 60, 70, 80, 90 percent?
- A. I was just trying to think of whether I've heard of some other commercial optical things like Look Optical or Mesa Optical, some of which are just different names for legal reasons. But I don't really know of any that I could say I have seen their office or know a practitioner in that office or have known a practitioner in that office that has what I call a commercial practice, except the ones that are associated with Texas State and Lee Optical. There could be one or two exceptions to that, but I don't think of any offhand.
- Q. How many commercial optometrists are encompassed within your knowledge, within your acquaintance and your knowledge, that you refer to now?
- A. Oh, gosh, I would say somewhere in the neighborhood of you mean people that for in tance I would know here in Austin, the optometrists in an office or I have actually talked to them in or out of the office or seen —

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- Q. Or know sufficiently enough about to be included within the figure you're giving me.
- A. I would say about 15 or 18.
- Q. Okay.
- A. Or that I would be able to say -
- Q. That you know personally.
- A. Yes.
- Q. Are you familiar with any commercial optometrist who is not practicing in the immediate vicinity and/or next door to an opticianry?
- A. No.
- Q. In your role as Legislative Chairman and President of TOA, did you have occasion to become familiar with the general nature of commercial optometry and commercial optometrists' tie-ins with opticianries either through discussions with legislators or discussions with other optometrists both professional and commercial around the State?
- A. Yes, as an officer of TOA and as legal and Legislative Chairman, it's been both my duty and responsibility to meet with legislative committees over a period of time that have been concerned with regulation of optometry in Texas since roughly 1954 or '55. And that also, with members of the State Board of Optometry where TOA would have joint concerns of interest, and where we would frequently discuss the court actions that either TOA or the State Board were involved in at length, both with members of our association and with legal counsel for the Board and legal counsel for our State Associations, so I —

- Q. Have you had occasion to read Dr. Rogers' deposition on the relationship between T.S.O. opticianries and the Doctors of Optometry who are his employees or who are his partners or who are independent practitioners in an associate office?
- A. Yes.
- Q. And are you aware, then, of the tie-ins or the relationship between commercial optometrists and opticianries being of that source?
- A. Yes.
- Q. What is the emphasis of commercial optometry in continuing education, Doctor, as you know it?
- A. The only specific thing that I have any particular knowledge about is that in the July session when the continuing education bill was passed, well both in Dr. Rogers' deposition and at the meeting, the Board held on the continuing education after the fact of passage of the bill, the Texas Association of Optometrists Officers and Dr. Rogers both said they were opposed to continuing education. And that's the only thing I know about that.

MR. KEITH: Opposed to what?

THE WITNESS: Continuing education bill.

- Q. Continuing education bill?
- A. Right.
- Q. That is the one that passed the Legislature?
- A. Right.

MR. KEITH: They say they were opposed to continuing education or continuing education bill?

THE WITNESS: They were opposed to that particular bill.

- Q. Doctor, have you read the Petition in the recent lawsuit filed by Dr. Freid, Et Al, against the members of the State Optometry Board seeking to declare the continuing education statute unconstitutional?
- A. Yes, I have.
- Q. Do you remember reading in that Petition that they sought to declare the statute —

MR. KEITH: I object to the question as calling for obvious hearsay. There is a Pleading that the Court ought to see —

MR. ARNETT: The question didn't call for hearsay answer. I believe the question was phrased, does he remember. It's not hearsay.

MR. KEITH: In the lawsuit, it is hearsay, and I object to it for that reason. Whether he remembers it or not is not hearsay.

But go ahead, Larry.

MR. NEIMANN: Get me a copy of the Pleadings.
Mr. Keith, I want to expedite the deposition, but
if you want to fill it up, I'll be happy to introduce
those pleadings into the record.

MR. KEITH: If he can vouch for those as being certified copies of the Pleadings, offer them.

MR. ARNETT: He can put them in as an exhibit to the deposition regardless of whether Dr. Riley certifies anything.

(Recess.)

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- Q. Doctor, is this the Pleadings that you have read to which you referred awhile ago?
- A. Yes.
- Q. And what is the style of that case?
- A. I don't know that technical term, but if you mean the —
- Q. Parties.
- A. Sidney Freid, Dan Geller, Melchior Landin, Paul Knie, Mel Rockoff, Plaintiffs, and Hugh Sticksel, Jr., E. R. Friedman, John Davis, Salvador S. Mora, John B. Bowen, N. Jay Rogers —

MR. ARNETT: I think that's enough.

- A. Okay. As Defendants.
- Q. Do you remember reading in this Petition that the Texas Association of Optometrists was also a Plaintiff —
- A. Yes.
- Q. in the lawsuit?
- A. Yes.
- Q. Although not named in the style?
- A. Right.
- Q. And do you remember reading that in the prayer of the Lawsuit that —

MR. KEITH: I object to any reference to the document unless it is offered before the Court at the time of the deposition.

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MR. ARNETT: Make that Exhibit No. 1, then.

- Q. Do you remember reading in the prayer of the Lawsuit that the Plaintiffs asked that Article 4552-4.01B, Texas Revised Civil Statutes, be declared irreconcilable conflict with the First and Fourteenth Amendments to the United States Constitution, and thus null and void?
- A. Yes, I remember reading that.
- Q. Was Dr. Mel Rockoff a Plaintiff in that case?
- A. Yes.

MR. KEITH: The Pleading itself is the best evidence of who the parties were and what their contentions were, and I will object to this witness's testimony or searches about his memory.

Q. Was the case filed in the United States District Court for the Northern District of Texas, Dallas Division?

MR. KEITH: I make the same objection. The Pleading itself under certificate of the Clerk constitutes the best evidence in its content.

MR. ARNETT: You may answer the question.

- A. Yes.
- Q. Is Dr. Mel Rockoff present President of the Texas Association of Optometrists?
- A. I don't know for sure if he is, when the election takes place he has been President. I am not sure that he is now. I think that he is.
- Q. Is this a copy of the judicial Pleadings that we have been discussing, Dr. Riley?

- A. Yes.
- Q. Is that the copy of the Pleadings upon which you base your testimony?
- A. Yes.
- Q. To the best of your knowledge and belief, is that a true and correct copy of that which is on file in the Courthouse regarding this lawsuit?

#### A. Yes.

MR. KEITH: May I ask the witness on voir dire before the answer is completed?

## VOIR DIRE EXAMINATION

#### BY MR. KEITH:

- Q. Dr. Riley, were you a Plaintiff in that lawsuit?
- A. No.
- Q. Were you a Defendant in that lawsuit?
- A. No.
- Q. Are you an employee of the Clerk's Office in the Northern District of Texas?
- A. No.
- Q. Were you served with a copy of that lawsuit by the United States Marshal?
- A. No.
- Q. Have you ever been served with a so-called certified copy of any Pleadings in such lawsuit?
- A. No.

MR. KEITH: I say the man is not competent to answer the question whether that's a true and correct copy of the Pleading on file in the Clerk's Office.

# **DIRECT EXAMINATION (Resumed)**

#### BY MR. NIEMANN:

Q. Dr. Riley, I'll withdraw the question. And we'll cure his objection simply by asking the Clerk of the Court to present us with a certified copy of the Pleadings. Okay?

# A. Okay.

MR. ARNETT: Let's do attach that as Exhibit 1 in this deposition, please.

MR. NIEMANN: At the request of the Attorney General, I would like to have this marked Exhibit No. 1.

(Defendant's Exhibit No. 1 (was marked for identification (by the court reporter.

MR. NIEMANN: And, for the record, I would like to tender it into evidence acknowledging that the Plaintiff has stated an objection thereto.

(Defendant's Exhibit No. 1 (was offered into evidence.

- Q. Doctor, as a practical matter, does the Texas Optometric Association include in its membership optometrists falling in what you have categorized as commercial optometry?
- A. No.

- Q. Is this by virtue of the general philosophy of the local associations?
- A. I -

MR. KEITH: The question is leading. I object.

- Q. What is the basis for the nonmembership of commercial optometrists in TOA?
- A. Membership in the TOA can be obtained by an optometrist only if he is licensed to practice in Texas and makes application through a local society. Each affiliated society has a geographical area which comprises their society, and if they reside and practice in that geographical area, then they apply to that local society for membership. Upon their application, the local society meets with the member and makes whatever study or observation of his mode of practice that they consider proper and necessary, and then they send the application to the State Association with the recommendation as to whether he should be admitted in membership. As a general rule, the recommendation of the local society is the guiding factor in approval or disapproval.
- Q. How about the philosophy of the local societies regarding commercial optometry?
- A. The reason for it being that way is that the State Association feels that the local society would be the one best qualified to make judgments as to the mode of practice and general competence and ethical professional conduct of the person, and this would be based on the concept of what is professional and ethical by that society. And I know of no instance when I was secretary treasurer of

TOA nor of my personal knowledge since that time when a person who was then practicing as a commercial optometrist was admitted.

- Q. Historically, have commercial optometrists been accepted into TOA membership?
- A. No.
- Q. Now, Doctor, I would like to turn your attention to the year 1967. Is that the year you were first elected President?
- A. Yes.
- Q. When did your term of office commence?
- A. In April of 1967.
- Q. Do you remember during that year appointments by the Governor of Texas to the Optometry Board and who those Appointees were?
- Q. Yes, and at that time, there were two members, two Board members whose term had expired, and the Governor appointed Drs. Geller and Shropshire to fill those positions.
- Q. It was Dr. Nate Rogers who had also already been on the Board that year?
- A. Yes, he had been a member of the Board for a few years at that time.
- Q. And do you remember the remaining members of the Board at that time?
- A. Dr. Jim Gill at Waxahachie and R. Woods at Grape Vine.
- Q. When were Dr. Geller and Dr. Shropshire appointed to the Board by the Governor?

- A. I am not sure of the date. It was in '67, but I am not sure of the date.
- Q. Do you recall during that year any meetings in which Dr. Geller, Dr. Shropshire and Dr. Rogers were the sole attendees?
- A. You mean meetings of the -
- Q. Meetings of the State Board State Board of Optometry?
- A. Yes, the meeting was held with Dr. Rogers and Dr. Geller and Dr. Shropshire. Again, I don't I am not sure of the date. But, shortly after their appointment, and the Dr. Rogers was elected President of the Board and Dr. Shropshire was elected Vice-President, and I believe Dr. Gill was elected secretary and treasurer. Dr. Gill and Dr. Woods were not present. And then at a subsequent meeting, the Board repealed the Professional Responsibility Rule.
- Q. When you say "the Board," do you mean all five members voted to repeal the Professional Responsibility —
- A. I mean those three members met again and repealed the Professional Responsibility Rule.
- Q. Were Dr. Gill and Dr. Woods -

MR. ARNETT: Could I interrupt for a moment? When you say "the three men met," you mean that they held a meeting, or do you mean some other form?

MR. KEITH: I object to that as instructing the witness -

Q. Did they meet as a Board?

- A. Yes.
- Q. Did they purport to meet as a Board?
- A. Yes. They sent out Notice of Meeting afterwards.
- Q. By vote of the three Board members that you just mentioned present at the Board, did they attempt to repeal the Professional Responsibility Rule?
- A. Yes.
- Q. Could you explain for the Court the general nature and content of the Professional Responsibility Rule as it existed in 1967?

MR. KEITH: The rule itself would be the best evidence on the contents, and I object to this witness's offhand version of an official account of the publications.

MR. ARNETT: You may answer the question.

A. The Professional Responsibility Rule had been adopted by the Board after it had been considered by the Board over a period of time prior to its adoption. And public hearings had been held on it. The general concept of the rule was to establish the —

MR. KEITH: I object to the answer as not responsive. He said, "Describe the nature of the rule in its concept."

MR. NIEMANN: And I also asked for him to describe the general content of the rule.

- Q. Would you please do so, Dr. Riley?
- A. The Professional Responsibility Rule was a rule which required an optometrist practicing in Texas

to so conduct his practice that the patient would know who was responsible for his care, so that the relationship of the optometrists to opticianry or other commercial concern would not be a controlling relationship and would be a matter of record. And that briefly is the general concept of the rule.

- Q. Was the Professional Responsibility Rule to which you refer promulgated prior to 1967 by the Optometry Board under its substantive Rule 19 power?
- A. Yes.
- Q. Was the general substance of that Professional Responsibility Rule embodied in the 1969 Optometry Act?

# A. Yes.

MR. KEITH: I object to the question as calling for conclusion of the witness. The rule itself will be the best evidence of its contents, and the statute of the State would - the Court can make its own independent judgment without this layman's assistance.

Q. Dr. Riley, I am handing you a copy of the official Supplement to - Black Statutes, one of the civil statutes of Texas. Is that a copy of the Texas Optometry Act, 1969, as amended?

MR. KEITH: Larry, this is no way — I object to the manner in which you are trying to prove an act that's before the Court.

MR. NIEMANN: Lay off.

MR. KEITH: I am not going to lay off. It's an improper question. The witness can't testify as to whether that is or is not the Optometry Act.

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MR. ARNETT: He can testify to it. Whether or not that's worth anything is another question, and we will certainly have the Act before the Court —

MR. KEITH: Then, offer the Act if you want to offer the Act in evidence.

MR. NIEMANN: It doesn't have to be offered into evidence. It's already into evidence by virtue of the law. I'm just asking him if that is what we're referring to.

# (Off the record discussion.)

- Q. Does it appear to be the Optometry Act in 1969 as amended?
- A. Yes.
- Q. Now, Doctor, at what section of the Optometry Act generally encompasses the substance of the old Professional Responsibility Rule.
- A. It's Article 4552-513, Professional Responsibility.
- Q. Thank you. Dr. Riley, what was the reaction of the professional optometrists to this attempted repeal of the Professional Responsibility Rule?

MR. KEITH: I object to the question as calling for a blatant conclusion on the part of the witness, that he is not competent to answer to what some of the illdefined group of people did, what their personal reaction was to an official act of government.

- Q. What was the general reaction of the members of the Texas Optometric Association to this attempted repeal of the Professional Responsibility Rule by Dr. Rogers, Shropshire and Geller?
- A. I would say they were outraged.

- Q. Do you say this from a position of speculation or knowledge?
- A. On the notice that the rule had been purported to have been descended became public knowledge, there were quite a few general meetings held, both locally and on State level, and at all of those meetings, this was a major topic of conversation —
- Q. Were you President of TOA during the time of the attempted repeal?
- A. I was President elect in early 1967, and took office as President in April of 1967, so I was President or President elect during that time. And the fact that this rule had been a matter of hearing before the Board had been adopted and so forth, and then was at the at a meeting where the Board was not fully representing optometry and did not have a quorum and so forth, that this kind of action was taken as a point of major concern with all the optometrists that I talked to at the time.
- Q. Dr. Riley, in the Spring of 1968, were there Legislative races of the House of Representatives and also for the Senate?
- A. Yes.
- Q. During the period of time of those campaigns, did the membership of TOA to your knowledge talk to candidates regarding this attempted repeal of the Professional Responsibility Rule?
- A. Yes.
- Q. Could you elaborate a little bit more on that statement?

- A. The before all Legislative races, of course, the - our Association is active in informing our members as to the nature of matters of concern that might come before the next session of the Legislature, and indicate to them what our interests and priority interests might be, and asking them to contact their legislators during the time that they are running for office and make them aware of our concerns, particularly the ones that they have any reason to support, are interested in supporting, that they be aware of what we consider important concerns for the coming Legislature. And, at that particular time, the two things that we were concerned about were the appointments for the Board and their confirmation in the next session and the fact that the Professional Responsibility Rule had been purportedly repealed, and that there might be some legal action unless the Professional Responsibility Rule was clearly incorporated as a basic part of the Act. And that was such a fundamental part of our concerns in protecting the interest of the public, we thought that rather than having it remain a bone of contention within the Board, that if it were a legislative act, this would settle it once and for all, so
- Q. Dr. Riley, did the leadership of TOA ask the membership to discuss this purported repeal with their Legislative candidates?
- A. Yes, and asked them both to discuss the method by which the rule was originally adopted by the Board, to point out the lengthy time, careful hearings, concern and so forth that was exercised before the rule was enacted, and then about the abrupt purported repeal of the rule with no hearing, no actions of any kind, and, by doing this,

make it clear to the members of the Legislature the need for having this part of the regulatory powers of the Board a part of legislation rather than a part of a Board rule.

- Q. Did the leadership and membership of TOA realize that Drs. Geller and Shropshire would have their appointments reviewed and up for contaction by the Senate in the next 1969 Legislature?
- A. We knew that it would be in '69, that they would be up for confirmation, yes.
- Q. Was this also part of the purpose of discussing this incident with the —
- A. Yes.
- Q. senatorial candidates?
- A. Yes. We were making the point that the action by these three members of the commercial element of optometry clearly indicated the need for this to be a part of the Optometry Act rather than a Board action. And —
- Q. By the way, when you said "commercial element of optometry," let's identify Drs. Geller and Shropshire to your knowledge, Doctor.
- A. Dr. Shropshire is an optometrist who at the time

   I don't know now if he is, but at the time, he was an employee of Lee Optical, and Dr. Geller also.
- Q. Is that the same Dr. Geller that was listed earlier as a Plaintiff in the lawsuit entitled Freid versus Sticksel —
- A. Yes.

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- Q. that we referred to earlier in the -
- A. Yes.
- Q. deposition?
- A. Yes.
- Q. Would you characterize the membership of the Texas Optometric Association as inactive, semi-active, active in politics and legislative races, Dr. Riley?
- A. Yes. I think that members of the Texas Optometric Association have a record of being very politically active, and have had since, to my knowledge, since the late 1940s.
- Q. All right. Dr. Riley, I hand you an instrument dated May 27th, 1968. Would you please identify that for the record.

MR. KEITH: Let me see it. too.

- Q. Would you please identify the instrument for the record, sir?
- A. This is a legal Legislative bulletin put out by the Chairman of that committee on May 27th to call the optometrists to Austin for a meeting to discuss the confirmation of Geller and Shropshire.
- Q. Was this during the time that you were President, Dr. Riley?
- A. Yes. Yes, my name is on the letterhead.
- Q. Is this a true and correct copy of the instrument, and was that instrument mailed to all members of TOA?

A. Yes.

MR. NIEMANN: I would like the court reporter to mark this as Defendant's Exhibit No. 2.

(Defendant's Exhibit No. 2 (was marked for identification (by the court reporter.

MR. NIEMANN: I hereby tender it into evidence.

(Defendant's Exhibit No. 2 (was offered into evidence.

- Q. Dr. Riley, was the matter of Dr. Geller's and Shropshire's appointment of such magnitude to call all of the optometrists in Texas to Austin who were members of TOA?
- A. Yes.
- Q. Why did you consider it so important?
- A. Well, as we said in this letter, this was a combination of the legal and legislative battle that has been going on for 15 years or more that and if the Board could be controlled by a majority of the commercial optometrists, then all of the efforts that we have made to more adequately enforce the Optometry Act, protect the visual welfare of the public of Texas will be lost.
- Q. Doctor, was there any special session of the Legislature in mid-1968?
- A. Yes, that was the reason for this notice. We knew that there would be a special session, and —
- Q. Okay. Was it called by Governor Connally?
- A. Yes.

- Q. By virtue of the special session, were the appointments of Drs. Geller and Shropshire up for confirmation?
- A. Yes.
- Q. And did the special investigation prompt the July 2nd, 1968 letter that I have just handed you?
- A. Yes.
- Q. Would you please identify that instrument for the record?
- A. That's a letter to all the TOA members signed by me and our legal Legislative Chairman, Phil Lewis, and telling them of this meeting and asking them to inform their Senators of our position on the confirmation of these two men.
- Q. During that meeting, did you discuss the attempted repeal of the Professional Responsibility Rule?
- A. Yes.
- Q. Was this a basis by which you fought the confirmations of those two doctors?
- A. Yes.

MR. NIEMANN: I ask the court reporter to identify the July 2nd, 1968 — to mark the July 2nd, 1968 letter as Defendant's Exhibit No. 3.

(Defendant's Exhibit No. 3 (was marked for identification (by the court reporter.

Q. Was Defendant's Exhibit No. 3 the instrument which we have just been discussing?

A. Yes.

MR. KEITH: Are you going to offer it in evidence?

MR. NIEMANN: Yes, I hereby offer the instrument into evidence.

(Defendant's Exhibit No. 3 (was offered into evidence.

MR. KEITH: I object to it as being a self-serving hearsay document, and it has no place in this record.

MR. NIEMANN: Are you objecting to the relevancy of it?

MR. KEITH: I stated my objection.

MR. ARNETT: That's fine if you can get the Court to buy it.

He will have to get the Court to buy it.

MR. KEITH: Difficult as it may be, if you will, include the sidebar remarks in the record.

- Q. Were Drs. Geller and Shropshire not confirmed by the Senate, Dr. Riley?
- A. They were not confirmed, no, sir.
- Q. And can you tell from Defendant's Exhibit No. 3 the date on which they were not confirmed by the Senate?

### A. Yes -

MR. KEITH: The record of the Senate would constitute the best evidence of its official action, and no record of this witness or no reference to the hearsay document can prove that their confirmation was denied or approved.

MR. ARNETT: That's already in evidence in certified form.

- Q. Dr. Riley, I would like to now discuss with you the 1969 Legislative session. And you were President, were you not, during this period of time?
- A. Yes, sir.
- Q. During the session, were there certain bills introduced which concerned professional optometry?
- A. Yes.
- Q. And the Texas Optometric Association?
- A. Yes.
- Q. And did TOA send out bulletins to its members regarding those bills?
- A. Yes.
- Q. Is this a copy of one of those bulletins?
- A. Yes.
- Q. Would you identify that for the record, please?
- A. It's dated February the 7th, 1969, and it's a flash bulletin to all TOA members enclosing a list of the Senate Public Health Committee and the House Public Health Committee informing them of House Bill 106, and asking that they appear in opposition to it, and Senate Bill 124, which was the Senate Bill.

MR. NIEMANN: I would like the court reporter to mark that as Defendant's Exhibit No. 4.

(Defendant's Exhibit No. 4 (was marked for identification.

MR. KEITH: I object to the document, Defendant's 4, as it attempts to explain or constitute some summary or shorthand rendition of an enrolled bill or proposed bill. The bill itself would constitute the best evidence of its content.

MR. NIEMANN: Mr. Keith, it's not intended to be introduced for that purpose, but rather for the purpose of showing the legislative activity of the Texas Optometric Association during the 1969 session.

MR. KEITH: Well, the instrument, then, would constitute hearsay.

MR. NIEMANN: I don't think so.

- Q. Dr. Riley, is this a true and correct copy from the files of the Texas Optometric Association —
- A. Yes.
- Q. of that bulletin?

A. Yes.

MR. NIEMANN: I hereby offer it into evidence.

(Defendant's Exhibit No. 4 (was offered into evidence.

MR. KEITH: I object for the further reason no proper predicate for this document has been shown. There is no showing this man was the custodian of this document, which is now some, by its own date, seven and a half years old. This is no more than a Xeroxed copy of some sort of a mimeographed process. There is a custodian of these records, and we have taken his deposition on three occasions.

Q. Dr. Riley, is that a copy of the letter that was sent out on that date?

- A. Yes, to the best of my knowledge, it is.
- Q. It went out under your approval, did it not, Dr. Riley?
- A. Yes.
- Q. As a matter of fact, you specifically approved the content of it, did you not?
- A. Yes.
- Q. Since you were President of the association at that time?
- A. Yes.
- Q. Would you say you might be considered one of the actual authors along with Dr. Lewis of this instrument?
- A. Yes.
- Q. As a matter of fact, Dr. Riley, on all of the letters that we have heretofore introduced into evidence or offered into evidence from TOA, were you not one of the co-authors of those letters as President of the association?
- A. I would have approved all of them.
- Q. The specific wording and content?
- A. Yes, these two I know I helped draft. The May 27th one, I am not sure.
- Q. And you vouch for the accuracy of those copies?
- A. Yes.

(Off the record discussion.)

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A. This is again a bulletin from the Legal and Legislative Chairman calling for a meeting of all TOA members in Austin Monday, February the 24th to discuss the State Board appointment, House Bill 106, Senate Bill 124, and a copy of it was enclosed with the notice of the meeting.

MR. KEITH: I am entitled to have it for Cross Examination.

Q. Did you also approve the specific wording of that letter?

MR. ARNETT: We don't have it. It's going to be difficult to get it for you.

A. Yes.

MR. KEITH: You can withdraw the document. But, if he's going to offer it as an exhibit, I am entitled to have the entire exhibit read. If they have got a copy of it, attach it, fine.

Q. Is it a true and correct copy of the letter that went to all the TOA members?

(Recess.)

A. Yes, sir.

MR. NIEMANN: Back on the record.

MR. NIEMANN: Would the court reporter please mark this Defendant's Exhibit 5.

Q. Dr. Riley, was Defendant's Exhibit No. 5, along with the enclosures referred to in the letter mailed to all members of the TOA?

(Defendant's Exhibit No. 5 (was marked for identification (by the court reporter.

A. Yes.

MR. NIEMANN: I offer Exhibit No. 5.

Q. The letter refers to House Bill 106 and Senate Bill 124?

(Defendant's Exhibit No. 5 (was offered into evidence.

A. Right.

Q. "Copy enclosed." Was that reference to the bills as they were originally introduced in the session?

MR. KEITH: I object to it unless the entire document is offered. You are offering now only an excerpt. The document itself refers to an attachment which is not included in the offer. Absent, it is not in complete - I'm entitled to see what the men were sent if they

were sent a letter with an enclosure or an attachment.

A. As far as I know, yes. I just don't remember whether there was any change at that time or not.

MR. DAVIS: I'm sorry. I can't hear the witness down here.

A. I said, as far as I know, I don't recall if there was any change in the way it was introduced at that time.

MR. KEITH: I object if you are offering Exhibit No. 5. It's again constituting a self-serving hearsay document of which this witness is not the custodian, and no proper predicate has been laid for its admission.

- Q. Doctor, were you one of the persons who approved and checked the exact language of that letter?
- A. Yes.
- Q. Would you qualify yourself as one of the co-authors of the letter although your name does not appear on it?
- A. On that one, I would not be sure of that, but I would have checked no legal bulletin is sent out without the President's approval.
- Q. All right. Dr. Riley, did the introduction of these two bills indicate that a major optometric fight was brewing in the Legislature?
- A. Yes.
- Q. Was this of concern to the Legislators as well as the optometric community?

MR. KEITH: I object. This witness cannot testify as to what was a concern to the Legislature.

- Q. Of the Legislators you personally knew -
- A. Yes.
- Q. was this a major concern?
- A. Yes.
- Q. As President of TOA, were you informed by your membership that this was of major concern to the Legislature?

A. Yes.

MR. KEITH: I object to the question as leading because the document itself shows on its face that the man was not President of TOA at the time this letter went out.

MR. DAVIS: It's also hearsay.

MR. ARNETT: It's neither leading nor hearsay.

MR. KEITH: It's leading. It's not only leading, it's misleading.

MR. ARNETT: We may have an improper predicate. That doesn't make it leading.

MR. KEITH: He said "as President of TOA."

(Off the record discussion.)

MR. NIEMANN: Back on the record.

- Q. When did your term of presidency expire, Dr. Riley?
- A. In April of 1969. Now, let me now, that yes, that should be right, '67 and '69. Should be April '67 to April of '69.
- Q. Okay. Now -
- We can call the TOA office and verify that if it's important.
- Q. Dr. Riley, did this fight brewing in optometry concern the Governor, to your knowledge?

MR. KEITH: That calls for again a hearsay conclusion on the part of this witness as to what did or did not concern a public official of Texas.

- Q. Did the Governor do anything evidencing his concern over this optometric battle, Dr. Riley?
- A. Yes, we had two or three conferences with the Governor, in fact, and —
- Q. When you say "we," who is we?
- A. Various members of the Executive Committee of TOA.
- Q. Did it include yourself?
- A. Yes. I was President of TOA at all the meetings we had with the Governor during the session in 1969.
- Q. Did the Governor suggest anything to try to resolve the —

MR. KEITH: I object to the question as calling for a hearsay answer. If the Governor took some official act, that would be a Secretary of State level —

MR. ARNETT: You may answer the question.

MR. NIEMANN: Mr. Keith, I am not asking for official acts. I am asking for suggestions made to Dr. Riley by the Governor regarding the resolution of this optometric battle.

MR. KEITH: That constitutes the rankest sort of hearsay.

- Q. Please answer the question. Did he make any suggestions to you?
- A. Yes, we met with him at least two times that I can recall.
- Q. Dr. Riley, I hand you a letter dated March 13th,

1969 on TOA stationery, and would you please identify that letter.

- A. This is a bulletin sent out on March 13th calling to our members' attention the fact that Governor Smith had suggested the plan by which the professional and commercial optometrists would meet and attempt to arrive at a mutually acceptable legislative act to be presented to that session of Legislature.
- Q. Is this a true and correct copy of that flash bulletin?
- A. Yes.
- Q. Did you approve the exact language of this flash bulletin?
- A. Yes.
- Q. Did you assist in writing it?
- A. Yes.

MR. NIEMANN: Would the court reporter please mark this as Defendant's Exhibit No. 6.

(Defendant's Exhibit No. 6 (was marked for identification (by the court reporter.

MR. NIEMANN: We offer it into evidence.

(Defendant's Exhibit No. 6 (was offered into evidence.

MR. KEITH: I object again. It constitutes compounded hearsay on the acts and statements of undefined third persons.

- Q. Dr. Riley, it does indicate the activity of the Texas Optometric Association during that Legislative session, does it not?
- A. Yes.
- Q. It is written documentation of the compromised plan purportedly proposed by Governor Smith, does it not?

# A. Right.

MR. NIEMANN: I hereby offer it into evidence acknowledging Mr. Keith has stated his objection.

- Q. Dr. Riley, I hand you now a letter dated March 21st, 1969, on TOA stationery. Would you identify that, please?
- A. This is a bulletin from the Legal Affairs Chairman to TOA members discussing the Governor's plan to have representatives meet from commercial and ethical optometry to attempt to reach an agreed legislative act to be presented to that session and lists who the members of the committee were.
- Q. Is it a true and correct copy of what was sent out to all members of TOA that date?
- A. Yes.
- Q. And as President of the association, did you approve the wording of this bulletin?
- A. Yes.
- Q. Did you in fact help author it?
- A. Yes.

- Q. Did you authenticate its accuracy?
- A. Yes.
- Q. Did you authenticate the accuracy of all the letters of TOA that we've heretofore offered into evidence?
- A. Yes.
- Q. Dr. Riley, I notice that on the fourth paragraph -

MR. NIEMANN: Before I forget, would the court reporter please mark that as Defendant's Exhibit No. 7.

(Defendant's Exhibit No. 7 (was marked for identification (by the court reporter.

MR. NIEMANN: I hereby offer it into evidence.

(Defendant's Exhibit No. 7 (was offered into evidence.

MR. KEITH: I object again to the hearsay document for which no proper predicate has been laid.

- Q. Dr. Riley, I call your attention to Paragraph 4 of the letter in which it lists a committee of Senators. By whom were those Senators appointed?
- A. The Governor suggested that each party select three Senators to represent them in deposition, and the TOA selected Senator Creighton, Herring and Word, and the commercial optometrist selected Senators Strong, Bates and Wilson.
- Q. And was that, to the best of your knowledge, the way in which Governor Smith appointed these Senators?

- A. Yes.
- Q. Now, as a practical matter, did all of these Senators on a continuous basis deal with the various drafts of the legislation, or was it a fewer number?
- A. Senator Creighton and Strong, to the best of my recollection, attended all meetings and were in constant contact. The other Senators were present at the first few meetings, and then irregularly after that.
- Q. Were there, you might say, unofficial members of this committee, in other words, optometrists from professional optometry and commercial optometry?
- A. Yes.
- Q. Who are the optometrists from the professional segment?
- A. Myself, Dr. Friedman and Dr. Day.
- Q. Is that Dr. -
- A. Robert E. Day and E. R. Friedman.
- Q. The same Friedman that is now a Board member?
- A. Yes.
- Q, Who are the commercial optometrists unofficially on this committee?
- A. Dr. N. J. Rogers and Dr. Ellis Carp.
- Q. Who is Dr. Ellis Carp associated with?
- A. Lee Optical.
- Q. Out of their Dallas headquarters?

- A. Yes.
- Q. Dr. N. J. Rogers was the same Nate Rogers who was the Plaintiff in this suit?
- A. Yes.
- Q. Did the committee of optometrists and Senators Creighton and Strong meet on repeated occasions to discuss the content of the proposed bill that would resolve the optometric battle?
- A. Yes.
- Q. Did the final version of the bill which was adopted by the Legislature, did it go through a number of drafts which were discussed and rediscussed by all members of this Committee?
- A. Yes. A bill, Senate Bill 781, as I recall, was the number, and it was introduced, and then immediately pasted over and cut up and redrafted and resectioned for quite a period of time, and then when the final draft was agreed to, it was presented and with the understanding there would be no amendments of changes, and that there were none or only one or two agreed changes, and that was the bill that was adopted.
- Q. Okay. Can you give me some of the major elements of — first of all, did this bill represent a compromise between professional —

MR. KEITH: What bill?

MR. NIEMANN: Senate Bill 781 that was finally passed. We referred to it, Mr. Keith, while you were whispering to your client.

MR. KEITH: I heard reference to Senate Bill 781,

and now you're talking about "the bill." He said there was some bill went through a number of drafts. Then you said "the bill."

MR. ARNETT: It's been clarified —

MR. NIEMANN: Senate Bill 781.

MR. ARNETT: — as finally passed.

- Q. Was it a compromise bill?
- A. Yes.
- What were the basic elements of the compromise between professional optometry and commercial optometry in this bill?
- A. The commercial element was particularly opposed to the rule-making power of the Board, and we agreed to - power of the Board to make substantive rules being eliminated or restricted, and with the understanding that with that agreement that there would be a composition of the Board that would insure that a majority of the members were members of TOA.
- Q. Was there also an agreement regarding incorporating present Board rules into the statute?
- A. Yes. The agreement was that there would be no further rules made, but the ones that had already been adopted would become part of the statute?
- Q. Were you able to reach agreement on price advertising?
- A. No.
- Q. Dr. Riley, I hand you now a Xeroxed copy of a letter dated May 1st, 1969. Would you please iden-

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tify that for the record?

A. This is a memorandum that we sent to the Governor telling him that the bill had been agreed upon with the exception of the parts that were not acceptable to both sides, which were to be arbitrated.

MR. KEITH: I object to the answer as being unresponsive to the question and contradicting the letter of May 1, 1969.

Q. Would you attempt to identify the letter again stating who the letter is to and who the signatures are on the letter.

MR. KEITH: The letter will speak for itself as to who the signatures are. If he recognizes the signature. he can state it.

- Q. Would you please answer my question, Dr. Riley?
- A. The letter was to Governor Smith and was a report from the committee signed by members of the committee and stating that they had agreed on certain matters, and that the other matters were to be arbitrated.
- Q. At the lower left-hand corner of the first page of this letter, there are two signatures. Would you identify those signatures?
- A. Lower left-hand corner.
- A. That's Jack Strong and Tom Creighton.
- Q. And at the lower right-hand side, reading from top to bottom, would you identify those signatures?
- A. That's Jay Rogers, Ellis Carp, James Riley, Friedman, E. R. Friedman and Robert E. Day.

- Q. Is that a true and correct copy of the instrument that it purports to represent, Doctor?
- A. Yes.
- Q. Were you in fact signatory to this instrument?
- A. Yes.
- Q. Did you assist in drafting the cover letter?
- A. Yes.
- Q. Now, I turn your attention to Pages 2 and 3 that are attached to the letter entitled "Memorandum." What basically do those two pages represent, Doctor?
- A. It's an outline of changes in the bill that we agreed to, or corrections, generally. And then that we agreed to submit to arbitration the other matters mentioned.
- Q. All right. I notice on Page 2 of the memorandum part of it is x-ed out. Is there any explanation for that?
- A. Yes, this was the part that was not acceptable, and that Senator Strong marked out, at our request before we signed it.

MR. NIEMANN: All right. I would like to have the court reporter mark this as Defendant's Exhibit No. 8.

(Defendant's Exhibit No. 8 (was marked for identification (by the court reporter.

MR. NIEMANN: And I offer it into evidence as a true and correct copy of that letter.

# (Defendant's Exhibit No. 8 (was offered into evidence.

- Q. Following the signing and submission of this letter, Dr. Riley, could you tell us what happened next?
- A. The bill was the matters that were up for arbitration were arbitrated, and the results of that arbitration were incorporated in the bill, and the bill was submitted to the Legislature and passed.
- Q. To whom were they submitted to arbitration?
- A. The arbitrator was Senator Mr. Le Maistre, Charles Le Maistre who at that time was the head of the University of Texas School of I mean University of Texas System Health Education Group.

# (Off the record discussion.)

- Q. Dr. Riley, I hand you now an instrument which purports to be the front page and fifth page of an instrument, and could you identify that for the record?
- A. This is the first and the fifth page of the substitute to Senate Bill 781 which was part of the agreement.
- Q. On the second page, Dr. Riley, on Line 13, does that purport to represent the clause requiring four members of the Board to be members of the State Association affiliated with TOA?
- A. Yes.
- Q. Were you involved in the preparation of this particular draft?

- A. Yes.
- Q. That this page represents?
- A. Yes.
- Q. Was it a cut and pasted job, so to speak?
- A. Yes.
- Q. And was that particular phrase cut and pasted in?
- A. Yes.
- Q. How do you know?
- A. You can tell by the way the copy is made where the — part of it is copied, and then part, there is a different way this was taken out, and something was pasted in there. That was frequently done.
- Q. Dr. Riley, as a practical matter, does this mean that four members of the State Board need to be members of TOA?
- A. Texas Optometric Association is the only association affiliated with the American Optometric Association.
- Q. Did everybody that was a party to this compromise or was involved, did they realize this to be a fact?
- A. Yes.
- Q. As a practical matter, was this a subject of controversy in the drafting of this proposed bill?
- A. Yes, it was the subject of a great deal of discussion with members of that committee. And —

- Q. Why?
- A. a great deal of the professional association had recommended that the bill include a provision that the Governor would appoint members of the Board from a list that had been approved by the Texas Optometric Association —
- Q. Why?
- A. Because of their belief that members of the Texas Optometric Association would make better members of the Board and would be more apt to protect the public interest. And the commercial element was, of course, opposed to this, but part of the agreement on the compromise was that if we agreed to the rule-making powers of the Board being limited, that they would then agree to the Board having a majority of members who were from the Texas Optometric Association.
- Q. Did you explain to the members of the committee the reasons why TOA felt that this membership requirement was important?
- A. Yes. We discussed at length with Senators of that committee the reason why we felt that the membership in the Texas Optometric Association was an important basic part of any new Optometry Act.
- Q. You did explain the reasons?
- A. Yes.
- Q. Could you summarize those reasons for us?
- A. We felt that a member of the Texas Optometric Association would make a better member of the Texas Optometry Board because of their emphasis

on quality of examination, competence of examination, their economic independence, their freedom from outside influence of outside interests, commercial interests and so forth, and because of their track record of support of law enforcement and improvement of education for optometrists in the State.

- Q. Now, Doctor, is this information that you've thought of purely for the purpose of this lawsuit, or was this the subject of actual conversation between you and members of that special senatorial committee appointed by the Governor?
- A. It was discussed with the members of that committee.
- Q. By whom?
- A. By me and by Dr. Day and by Dr. Friedman, and was discussed at length. I've summarized the basic elements, but the general concepts were enlarged upon frequently because this had been a general idea that we had discussed and had debated within the association for the last two or three years. This is part of the general concept that the Board could best protect the public if the members of that Board were men of the greatest competence and highest integrity and honesty. And we felt the best possibility of that being true was for them to be members of the Texas Optometric Association or selected by the Texas Optometric Association.
- Q. Did you refer to the specific example of the attempted repeal of the Professional Responsibility Rule when you're referring to a track record of law enforcement?

- A. Yes. And when this was debated, it was natural that the people representing commercial optometry would question whether this was true or not, and we discussed again at length the fact that the one time that they had had a majority of the Board, the specific action they took, we felt, substantiated our argument that the Board would best serve the public if the majority of the members were members of the Texas Optometric Association.
- Q. Did you discuss with members of the committee this concept of economic independence, and did you give them specific examples?
- A. Yes.
- Q. Did you discuss with them the concept of quality care?
- A. Yes.
- Q. In your discussions with the Legislators, did you ever make reference to a letter purportedly written by Dr. Shropshire in 1961?
- A. Yes.
- Q. Is this a copy of the letter to which you refer?
- A. Yes.
- Q. I hand you an instrument dated February 15th, 1961, purportedly on the stationery of Dr. C. T. Shropshire. Is this a true and correct copy of the instrument that you showed to various members of that committee?

MR. KEITH: I ask leave to take the witness on voir dire if I may before he answers the question.

MR. NIEMANN: I would like to finish some identification questions, and then you may take him on voir dire, Mr. Keith.

MR. KEITH: Before his reference to — are you going to label this thing?

MR. NIEMANN: Not yet.

MR. KEITH: Are you going to give it a number?

MR. NIEMANN: Not yet.

MR. KEITH: I am entitled to ask him some questions about it before you interrogate him with respect to it.

MR. ARNETT: Let him ask the questions.

MR. NIEMANN: I would like to ask my question first.

Q. Is this a copy of the -

MR. KEITH: Is what? I object to any reference to any document until it's been identified so the Court will know precisely what we're talking about.

MR. NIEMANN: I ask the court reporter to mark this as Defendant's Exhibit No. 9.

(Defendant's Exhibit No. 9 (was marked for identification (by the court reporter.

- Q. Dr. Riley, is this a true and correct copy of the instrument which you gave to members of the committee?
- A. Yes.

Q. This particular letter copy was used both before that committee and before other members of the Legislature during that session to emphasize some of the points we were making on — for persons not being — the fact that when they were not economically independent, it could affect their perfessional judgment?

#### A. Yes.

MR. NIEMANN: Do you want to take him on voir dire, Mr. Keith?

## VOIR DIRE EXAMINATION

#### BY MR. KEITH:

- Q. Doctor, you have been shown Exhibit No. 9. Do you have the original of this document?
- A. No, I do not.
- Q. Did you ever have the original of such document?
- A. I -
- Q. I mean the original writing of this by the supposed Dr. Shropshire?
- A. I have never had such a thing.
- Q. Did you ever have any signed copy of this letter?
- A. I have never had such a letter.
- Q. And you do not have such now?
- A. I do not have such now.
- Q. You are not testifying under oath as a matter of personal knowledge Shropshire wrote this letter?

- A. I am not.
- Q. Or that he ever said anything contained in the letter?
- A. I am not.
- Q. And was the letter sent to you, mailed to you purportedly by Dr. Shropshire?

#### A. No.

MR. KEITH: I object to it as constituting hearsay, and any further reference to the letter to be.

# **DIRECT EXAMINATION (Resumed)**

## BY MR. NIEMANN:

- Q. Doctor, to make it clear, I am not discussing this with you for purposes of authenticizing this as a letter from Dr. Shropshire, but rather authenticizing this is a true and correct copy of that which you gave to the members of the Legislature.
- A. Right.
- Q. Particularly to the members of this committee.
- A. Yes.
- Q. Did you give a Xeroxed copy or a copy of this letter to members of that committee?
- A. Yes.
- Q. Were copies of this letter given to various members of the Legislature —
- A. Yes.
- Q. by members of TOA?

- A. Yes.
- Q. Were they asked to do so?
- A. Yes.
- Q. Do you know whether Dr. Shropshire was aware that this letter was given to members of the Legislature —
- A. No, I do not.
- Q. members of the Legislature at this time? Was this letter part of the basis by which you discussed the subject of quality care?
- A. Both quality care and independence with financial influence, economic influence.
- Q. Doctor, because of the optometric terms utilized in the letter and because of the nature of the Xerox copy, would you please read the letter for the record so there will be no mistake about the interpretation of the words?
- A. Do you want me to read all the letter?
- Q. Please.
- A. "From the desk of Dr. C. T. Shropshire. February 15, 1961.

"Dear Doctor, On February the 28th, please remove the following frames from your stock and display and transfer back to Dal Tex."

And I cannot read the line below that, but I assume it was the —

MR. KEITH: I object to this man's assumption.

Q. Don't assume anything.

A. "You will not order or sell these members when your office changes to the new price policy March 7th. All other frames will remain and will be included in our advertised prices. It is mandatory that all personnel adhere to the new price structure without deviation.

"May I suggest that the prescribing of bifocals be limited to Kryptoks. However, if a patient is wearing or requires a Flat Top or Ultex, you should prescribe it. Trifocals, Executives, Baseballs, Lenticulars, and so forth should not be prescribed or fitted."

And that's underlined, "but should not — Trifocals, Executives, Bifocals, Lenticulars, so forthe should not be prescribed or fitted" is underlined. "Even if a patient is willing to pay more for such. Do not charge more than the advertised price under any circumstances.

"We plan an extensive advertising program to acquaint the general public in your area of the terrific value in eye wear and eye care available at your office. Increased traffic through your doors will reflect a healthy office.

"Your cooperation and enthusiasm will insure a successful office operation now, and in the future, as well."

And then something I cannot read. And then, "Thank you" and something I cannot read, and then, "Dr. Shropshire."

MR. NIEMANN: Does the court reporter have any questions about the technical words?

MR. V. ROGERS: Dr. Riley made a couple of mistakes, one where the rereading in the underlined portion, he referred to Baseballs as bifocals. So, the court reporter should recognize that.

MR. NIEMANN: That's what I was afraid of, technical language.

- Q. Would you reread the second paragraph so there is no doubt?
- A. I will be glad to. "May I suggest the prescribing of bifocals be limited primarily to Kryptoks. However, if a patient is wearing or requires a Flat Top or Ultex, you should prescribe it. Trifocals, Executives, Baseballs, Lenticulars, and so forth, should not be prescribed or fitted. Even if a patient is willing to pay more for such. Do not charge more than the advertised price under any circumstances."

MR. DAVIS: We would like the written record to reflect the witness has been reading from a disassembled and disconnected, in part illegible, letter, the materiality of the illegible parts being undeterminable from this purported copy, and further that this purported copy has been in respects smudged and extremely difficult if not impossible to decipher, and further that this copy appears to have been made from another or other copies or secondary renditions of the original.

Q. Dr. Riley, would you describe the significance of this letter as you explained if to the members of that committee?

# A. Our point —

MR. KEITH: I object. This constitutes the rankest form of a self-serving declaration and a hearsay statement.

MR. NIEMANN: Mr. Keith, I am just asking him what he told -

MR. KEITH: I am leveling my objection to it.

MR. ARNETT: Let's not argue over the objections now. Let's have the witness answer the question.

MR. KEITH: I can make my objection and he can answer the question if he —

- Q. Answer the question. What did you explain to the Senators regarding this letter?
- A. The point in using this letter as an example of the possibility that commercial optometry's quality of eye care and control by and the effect it could have on their personal judgment to be under the influence of control of a commercial third party was two or three things: First, a Kryptok bifocal is an inexpensive, less desirable, less efficient type of bifocal —
- Q. Than what?
- A. Than a Flat Top or Ultex, which would be again a better optically a better type of bifocal, and particular Trifocals and Executives and Baseballs, Lenticulars, are the type of lenses that certain patients would require because of special need.

Trifocals would be required because the patient would be at the point where, like in my case, where I cannot see clearly beyond or at arm's length except through Trifocals, so if my profession or my occupation required me to operate regularly at that distance, I would be very handicapped not to have that available. An Executive is a straight-lined bifocal that gives a wider field of vision up near, less image jump going from the top of the lens to the bottom of the bifocal. Therefore, again, if I were in an occupation that would

require me to continually use that area and to go from top to bottom, they would make a significant difference in my - both my comfort and efficiency whether that was available for me or not. Baseball is a name for a trifocal where the bifocal is at the bottom and the trifocal is at the top. so that the person in a special occupation like a paint trimmer, for instance, could see at again at arm's length looking through the top of his glasses. and anyone that needed that particular type of trifocal would be severely handicapped in their work if it was not made available to them. Lenticulars are lenses that, because of the strength of the correction, the optical power of the lens is a segment in the middle, and a carrier lens used to fill out the frame so that the weight and distortion due to the large Lenticular - large refractive power is minimized, and again, not being available to a patient would mean that patient would not be given the best care possible.

And then we pointed out that following this, "Even if a patient is willing to pay more for such." In other words, there would be no question but what the patient's best interest would not be served even if the patient were wise enough to know the need for that particular type of thing and to request it, and when told it was not available, say, "If it costs more, I'll pay for it," they would say, "No, it is not available."

- Q. Now, Dr. Riley, are Kryptoks generally a cheaper variety of bifocals?
- A. They are much less expensive.
- Q. Than what?
- A. Than a Flat Top or Ultex type of corrective curve

- or Trifocals, Executives, Baseballs, Lenticulars and so forth.
- Q. When you say, "much less," how much, generally speaking, in terms of percentage?
- A. About, I would say, roughly 40 percent of the others.
- Q. All right. If a doctor followed a procedure of not prescribing Trifocals, Executives, Baseballs, Lenticulars in a normal practice, would that be a departure from what you characterize as quality in care?
- A. Yes, it certainly would be.
- Q. Are Trifocals, Executives, Baseballs and Lenticulars more expensive type of lenses?
- A. Yes.
- Q. Than what?
- A. Than Kryptoks or the typical Flat Top or Ultex bifocal.
- Q. Was a shorthand version of what you have just stated regarding the significance of this letter dated to the members of the senatorial committee preparing the compromise draft version in 1969?
- A. You mean an actual document of the -
- Q. Was an explanation or discussion of this letter -
- A. A brief discussion of it was made, yes.
- Q. Do you have reason to believe that a discussion of this letter was also had between other members of TOA and members of the Legislature?

- A. Yes.
- Q. In the House?
- A. Yes.
- Q. In the Senate?
- A. Yes.
- Q. Why?
- A. When any matter of legislative concern with TOA is going to be heard before a committee of the House or Senate, or is up for legislative action, the members are not only notified of the of that possibility or probability, but also are informed of our position on it, and then are given the information that we might have. It would help make the basic concepts that made us be particularly for or against a bill, the basic concepts that could be supported by some kind of evidence. And, so, we would make up what we call a kit where we would actually have documents like this and brief explanations of the major points of the bill and so forth, and we would send this to them, or we would —
- Q. When you say "them" and "they," are you referring to members of —
- A. The TOA members, yes,
- Q. Okay. As President of TOA, can you testify that you instructed or that members of TOA were instructed to discuss this subject with members of the Legislature?
- A. Yes.
- Q. During 1969?

A. Yes.

Q. Prior to passage in 1969 of Senate Bill 781?

A. Right.

MR. NIEMANN: I offer Defendant's Exhibit No. 9 into evidence.

(Defendant's Exhibit No. 9 (was offered into evidence.

MR. KEITH: I object for all the reasons heretofore stated. It is obviously a phony document.

MR. DAVIS: And for the further reason that if it's offered as an alternative hearsay to show the effect on the hearer, that best evidence on the effect on the hearer or recipient would be the officials of the Legislature itself, alternatively the law that was enacted by the Legislature or, alternatively, the testimony of the Legislature itself, which obviously we cannot —

Q. Doctor, I asked you the simple question, did you discuss this letter with members of the Legislature?

A. Yes.

Q. Particularly the committee members?

A. Yes.

MR. ARNETT: I am glad the Plaintiff's attorneys note that the Legislatures, the effect on the Legislators of such exhibitions may be indicated in the bill and in the statute.

MR. DAVIS: But none has been offered into evidence.

- Q. Did members of TOA lobby with members of the House and the Senate for the passage of Senate Bill 781 —
- A. Yes.
- Q. as it was finally agreed upon between professional and commercial optometry and this special Senate committee?
- A. Yes.
- Q. Can you remember what specific committees in the House or the Senate were involved —

MR. KEITH: Those agencies would be the best evidence of which committee presented the bill and which committee they are.

MR. NIEMANN: I asked what members he talked to.

- A. Yes, we appeared before the Senate and House Committee.
- Q. Were the specific major elements of the compromise discussed by members of your association with the members of those legislative committees?
- A. Yes.
- Q. Was the concept of quality eye care discussed with them?
- A. Yes.
- Q. Concept of economic independence discussed with them?
- A. Yes.

- Q. Concept of law enforcement -
- A. Yes.
- Q. discussed with them by members of TOA?
- A. Yes.
- Q. Is there anything in particular in the passage of this bill through the Senate that indicated this bill may have received more than normal passing attention by the Senate?
- A. When the bill was presented on the floor of the Senate, Senators Creighton and Strong both got up and told the members of the Senate briefly of the committee that had considered it, and that both factions of the controversy in optometry had agreed to it, and they felt that this would result in not having the usual optometric fight that we had had for two or three sessions of the Legislature prior to that, and the Senators stood up and gave him a standing ovation. So, I think they were acutely aware of both the problem and the result of the compromise.
- Q. Are you in a position to testify of whether or not the Senate had been lobbied by the members of TOA regarding this bill prior to its passage?
- A. Yes, they had been.
- Q. Are you aware whether or not did members of TOA lobby for the passage of this bill?
- A. Yes.
- Q. Why was it necessary in view of the so-called vote to compromise?

- A. We felt that there could be an attempt to amend the bill, which is always a possibility of the Legislature, and we wanted all the members of the House and the Senate to be aware of the fact that this was a compromise, that in that compromise was the agreement that there would be no changes on the floor of the House or Senate of any kind.
- Q. Okay. Were the basic elements of the compromise and the reasons therefor discussed with members of the Legislature to your knowledge?
- A. Yes, at length.
- Q. Now, Doctor, I want to ask you one of the same questions that was asked earlier in depositions of members of the Optometry Board, and that is, can you tell us in your own words if there are reasons why the Legislature could have required Optometry Board members to be members of TOA?
- A. I'm confident that both the members of that compromise committee, senatorial members and the members that voted to pass the bill in the House and the Senate were very much aware of our argument that one of the key provisions in the bill was the fact that four members of the Board would always be members of that association that's affiliated with American Optometric Association. And that the reason for this was that we believe that the members of the Texas Optometric Association would be more concerned with quality eye care, be more concerned with an adequate complete thorough examination, would be economically independent, free from influence of outside interests, more apt to act in behalf of the patient first and then economic interest of themselves or a third party last, and that their track record of the Texas Optometric Association and its mem-

bers in support be optometric education, the updating of the Optometry Act since its beginning in 1920, and clearly indicated that members of that association would be more apt to be concerned with law enforcement, adequate education, and therefore more apt to protect the public interest.

- Q. You used the words "more apt," Doctor. Are you saying that members of the TOA have any magical superiority and competence or honesty or integrity or devotion or dedication than a nonmember of TOA?
- A. No.
- Q. Well, could you expound on the phrase you used, "more apt to be a better Board member"?
- A. For instance, it's in the federal judiciary, the judges are appointed for life. The reasoning of the legislative act which provided for this was that in that way, they would be more apt to be free from outside influence, the fact that they were economically independent, that their jobs were secure for life, that they did not have to run for office would make it more probable that they would be impartial, completely honest and so forth. I think the Legislature felt that our argument followed this same line of reasoning, that TOA members would be more apt, more probable, more likely to serve the interest of the public in that in their position on the Board. But it certainly would not guarantee that they would.
- Q. Are you familiar with the testimony given earlier in this case by Dr. Friedman and Dr. Bowen regarding this same question? Are the TOA Board members better qualified to be —

- A. Yes.
- Q. on the State Board?
- A. Yes, I've read both depositions.
- Q. Is your position inconsistent with their testimony?
- A. Not at all.
- Q. Would you explain that, Dr. Riley?

MR. KEITH: The question is argumentative. Any explanation he gives could only be argumentative in "How does my questions square with someone else's." He can give his testimony, and that's all.

MR. ARNETT: You can answer the question.

MR. DAVIS: I object to it on the further ground it constitutes an attempt to bolster the testimony of other witnesses.

MR. ARNETT: You can answer the question.

- Q. Dr. Riley, can you say categorically that a TOA member will make a better Optometry Board member?
- A. Absolutely not.
- Q. Are you purporting to indicate that a in any way or implying in any way that a member of TOA will make a better Board member? Does it have anything to do with their qualities as an individual, their competence as an individual?
- A. It would not mean that they were a better person, that they were more honest, that they were more objective and so forth, but the probability that a TOA member would have the three quali-

ties I've already discussed would be much greater than it would be a non-TOA member would have those. I think the Legislature clearly recognizes that fact.

- Q. Was this argument used with the Legislature?
- A. It certainly was.
- Q. By members of your association?
- A. Yes.
- Q. Prior to the passage of -
- A. Yes.
- Q. the 1969 compromise bill?
- A. Yes.
  - MR. ARNETT: I have got a couple of questions.
- MR. KEITH: I object now to multiple lawyers interrogating the same witness.
  - MR. NIEMANN: Can we take a brief recess, please.

## (Recess)

MR. KEITH: I take the position that this Intervenor, Niemann —

MR. NIEMANN: I am not the Intervenor.

MR. KEITH: TOA represents interests which are identical to those prosecuted by the Attorney General. Under the rules appertaining in this case and in the Eastern District of Texas, one counsel and one counsel only is entitled to interrogate a witness. Now, you all have chosen you wanted Mr. Niemann. I say that's

all the lawyers you are entitled to have interrogate the witness.

#### **FURTHER DIRECT EXAMINATION**

#### BY MR. ARNETT:

- Q. Dr. Riley, did we discuss what current positions you hold in various organizations?
- A. No, I don't think so.
- Q. Would you like to tell the Court what positions you currently hold?
- A. I'm on the Executive Committee of the Texas Optometric Association. I'm treasurer of the Foundation for Educational Research Division. I am Chairman of the Board of Texas Vision Services, President of TOA Credit Union, member of the Optometric Advisory Committee to the Selective Service Board, member of the Texas Medical Advisory Board to the Department of Public Safety.
- Q. You mentioned TOA's activities and your activities and the organization of the College of Optometry in Houston. Did TOA take an official stance toward the creation of that college?
- A. Yes, they did. They were not only officially on the record of supporting it, but through the efforts of TOA members, \$100,000 was raised to help financially support the college when it first started.
- Q. You also mentioned you were Chairman of the Board from '71 to '73?
- A. Right.
- Q. Is this the Texas State Board of Optometry?

A. No, that's the Chairman of the Texas — Board of Directors of Texas Optometric Association. I have never served on the Board of Examiners.

MR. ARNETT: Okay. No further questions.

MS. PRENGLER: I would like to state for the record so it would be before the Court in this deposition that the motion was made by Mr. Niemann to participate on his own behalf in the deposition, and the order signed by Judge Fisher makes it clear that he was granted leave to participate in the deposition. And there was no understanding whatsoever that he would take the place of the Attorney General who is attorney of record in this case.

### **FURTHER DIRECT EXAMINATION**

## BY MR. NIEMANN:

- Q. Dr. Riley, earlier, the objection was made to Defendant's Exhibit No. 5 for its failure to include an enclosure which was referred to in the letter. I hand you what was marked Defendant's Exhibit No. 5, and would you describe the enclosure that is referred to there?
- A. The enclosure was House Bill 106, and the companion bill, Senate Bill 124, which was identical. And I have talked to our Executive Secretary's office, and they said that in that instance, the legislative service would ordinarily only furnish us with a copy of the one bill, and that that is what our records show, that we never had anything with the House Bill 106, that we did not send out a copy since we noted at the bottom that they were identical. So, we sent out only one of the bills even though we were referred to both of them.

MR. NIEMANN: I would like the court reporter to mark this as Defendant's Exhibit No. 5-A.

(Defendant's Exhibit No. 5-A (was marked for identification (by the court reporter.

- Q. Dr. Riley, would you identify Defendant's Exhibit No. 5-A, and what does it purport to be?
- A. It says, "Legislative Service." Copy of the House Bill 106 introduced by Nugent, and referred to the Committee on Public Health on 2-5-69.
- Q. Is this a true and correct copy of the enclosure that was included in the February 17th, '69 TOA letter to its members marked Defendant's Exhibit No. 5?
- A. Yes.
- Q. Does Defendant's Exhibit No. 5 and Defendant's Exhibit No. 5-A constitute the entire mailout to the membership on that date?
- A. Yes.

MR. NIEMANN: I offer Defendant's Exhibit No. 5-A into evidence.

(Defendant's Exhibit No. 5-A (was offered into evidence.

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[By Mr. Keith]

Q. All right. Is there a charge for your service in connection with the examination and dispense of soft contact lenses?

- A. Yes.
- Q. What is that charge?
- A. The charge is \$25 for the initial examination. \$30 additional if the contact lenses are considered to be suitable for the patient, the preliminary part of a soft lens examination is done. So, if a total examination, the normal routine examination and the additional testing that's done for soft lens patient are combined, it would be a total of \$55.
- Q. What is the charge to the patient for the lens that you dispense?
- A. \$150.
- Q. So, the total charge is what?
- A. \$305. In addition to the lens itself, there is a charge made for a 90-day supervision of the patient. There is no patient in my office that's fitted with either soft or hard contact lenses except on the basis of a complete fee which includes the initial examination, additional testing for wearing contact lenses and then 90 days supervision, and insurance warranties on the lens during that period.
- Q. So, the total cost to the patient is \$305?
- A. \$305, right.
- Q. For Bausch and Lomb Soft Contacts?
- A. Right.
- Q. Your follow-up examinations cover what period of time?
- A. Ninety days.

- Q. Ninety days from the date of dispense?
- A. The initial dispensing of the lenses.
- Q. Any care or service or treatment required after 90 days that there is an additional fee for?
- A. The only thing that routinely is held to 90 days exactly is the insurance coverage on hard contact lenses. The general rule is that if a patient has any problems beyond the 90 days, that his care is continued without additional charge for at least another 30 or 60 days.
- Q. What is your charge for the examination and dispensing of hard contacts?
- A. Your routine examination is \$25. The additional testing with hard contact lenses is \$10. The total fee is \$205. No, \$200. I'm sorry, \$200. The difference is the supervisory fee.
- Q. Now, you said that you got a twenty on soft contacts, you have a \$25 fee, \$30 fee, \$150 charge for the lenses and then \$100 supervisory or followup fee?
- A. Right.
- Q. What does that lens cost you that you charge \$150 for?
- A. At Bausch and Lomb a lens from the laboratory is \$37.50.
- Q. And then you have the -
- A. For the lens which is \$75 a pair.
- Q. All right. Plus the kit?

- A. Plus the acepticizing unit and so forth, the total laboratory cost is about \$100 to \$105.
- Q. I understood it was \$92. Is that wrong?
- A. I don't know. I just tell you what my understanding is. I can't be exact about that because it changes so often.
- Q. All right. How many patients do you examine and prescribe for in the course of a year?

\* \* \*

#### A-261

# [In the United States District Court for the Eastern District of Texas]

# DEPOSITION OF DR. HUGH STICKSEL, JR.

# [33]

- Q. And do you charge something in excess of the laboratory fee for the eyeglasses?
- A. Yes, as stated there.
- Q. So in other words the---
- A. Service.
- Q. ---can you give me an approximate cost on these eyeglasses from the laboratory?
- A. I really can't. I can tell you we deal with American Optical and Bausch and Lomb and you can get a price list from them that tells pretty close. I really don't know.
- Q. In other words, you do mark up the glasses that you receive from the laboratory, you charge more?
- A. Well, ours -- we do have what we consider a onethird, we have a cost plus one-third of material cost to cover depreciation, breakage and this type of thing.
- Q. Like a---
- A. Anything above that is related to professional services.
- Q. Fine.

MR. KEITH: Your cost plus one-third?

- A. Like if it was four dollars or let's say three dollars, one-third of that would be one dollar for the depreciation, breakage, this type of thing, you know, basically.
- Q. Isn't your income higher because you dispense glasses than if you were not to be in the dispensing business?
- A. I think without a doubt.
- Q. Without a doubt. What approximate portion of your income is due to your dispensing operation?
- A. I can't even give you -- I couldn't give you an approximation because I would have to sort it out. I have never done that. I have never done the statistics.
- Q. Well, for example, on a \$66 pair of eyeglasses you have a total of \$44 associated with other things than the examination, is that correct? In other words if someone came into your office and simply -- and you only examined their eyes and you sent them off to a dispensing optician for their glasses, you would receive a fee of what, 22 to 25 dollars?
- A. That would be 28 to 31.
- Q. 28 to 31. Okay. The additional---
- A. Six dollars.
- Q. ---three to six dollars?
- A. No, that would be six dollars added to either the 22 or six dollars added to the 25.
- Q. That is for what purpose?
- A. That serves three things. One is for writing

#### A-263

- prescription, then asking the patient to bring it back where we can verify that, then any final adjustment.
- Q. So in other words, if you were just to do that, perform that service of examining the eyes, writing the prescription, and making certain that the patient returns that prescription to conform -- the glasses conform with the prescription, then you would not receive the income in the amount of \$38 from the \$66 price, is that correct?
- A. Which figures are you now---
- Q. We are talking about a \$66---
- A. Charge.
- Q. ---charge.
- A. And you are taking what from that \$66, what figure?
- Q. We are taking \$38 from that. In other words, the lens and prescription services of \$22, frames and related services of \$18, and the FDA handling charge of four dollars, which totals \$44 less the six dollar charge which you would add for writing the prescription and making certain that the glasses conform to the prescription. So in other words, if you were not to be in the dispensing business as well as performing your professional services related to the eye examination, you would not realize this extra \$38.00 of revenue, is that correct?
- A. Less the cost of materials?
- Q. Well, I am not asking profit. I am just talking about your revenue, in other words, your---
- A. Yes, I think that---

- Q. Okay. Would it be economically feasible in your practice not to engage in any dispensing operation, simply to write the prescription and -- to examine the eyes and write the prescription when necessary?
- A. Yes, sir, I believe so with some changes.
- Q. With what type of changes
- A. Reducing the number of personnel that have to render the services, like you have four individuals right there that are involved totally in that area, so you would be eliminating overhead considerably---
- Q. Why would you---
- A. ---telephone, utilities, space.
- Q. Why do you not do that?
- A. You know, I don't know. That's a good question because we are seriously considering it and our thinking is moving toward federal health care. I think we are going to have to move more and more that way. I think that is a good question. I think we probably will move more in that direction.
- Q. In other words, you are saying that you are planning to rid yourself of the dispensing end of the business?
- A. I'm not -- I am saying we are thinking in that direction.
- Q. But you have never actually done that?
- A. No, but that's our---
- Q. And in fact you find it to your economic advantage to be in the dispensing business as well as the profession of examining eyes, is that correct?

- A. I believe I have already answered that yes.
- Q. The answer is yes?
- A. Yes.
- Q. Are you familiar with the practice of ophthalmology under a trade name?
- A. I have not really been exposed to it in Amarillo. There are no -- there are practices in ophthalmology but they are all under their own name. There is no trade name.
- Q. Are you familiar with that practice or have you heard that that practice exists anywhere in the state of Texas?
- A. Yes, I have heard that.
- Q. Can you give me an example of a name that is used?
- A. No, we had an example presented to the Board not too long ago. I think it might have been a fictional example. I don't know. I mean I don't think it was an actual name, was it?

MR. KEITH: Dr. Joe?

A. Yes, but I think he gave us a for instance. I don't think he used a real name.

MR. OLIVER: He was not an ophthalmologist.

- A. Well, he was talking he was relating to an ophthalmological situation but I think he just gave us a name, I think. I think he was talking about Houston and Joe was talking about Austin.
- Q. You were here, I guess, when we were taking depositions and the reference was to the Eye Clinic

in Dallas, a group of ophthalmologists practicing under that trade name?

- A. Right.
- Q. Do you see any adverse effects to the public by virtue of the ophthalmologists practicing under the aegis of that trade name?
- A. Not so much the ophthalmologist as I do the optometrist.

[43]

- Q. Okay. Dr. Sticksel, how are the people in Texas served by a majority of the Board being members of TOA?
- A. Okay. I think the main way that people of Texas are served is that there can sometimes be at least four independent individuals who have no financial involvement or control from any other individuals or optical companies. For instance, there are certain contracts that certain individuals sign when they are associated with optical companies in which they can be terminated within 30 days or less. There are also certain guaranteed salaries that these individuals can receive, and it would be very hard, in my estimation, for an individual in this position to sit on the Board and to make independent decisions without being aware of possible economic consequences.
- Q. Is that the only reason that you can think of?
- A. Yes, sir, that's the only reason.

MR ROGERS: I would like the court reporter to

reread that reason because I didn't wholly comprehend it.

(The reporter read the (answer as above set out.

- A. I might also add to that statement that in certain situations individuals are furnished equipment and secretarial help by these optical concerns also.
- Q. Can you cite a specific example of what you are talking about as relates to Dr. Mora?
- A. No, sir.
- Q. Or to Dr. Rogers?
- A. No, I -- well, no, I couldn't.
- Q. This is total speculation on your part, is it not?
- A. Yes, sir, I think you asked me if there was any reason that I felt there might be a problem.
- Q. Could that not be true of the TOA as well, those members of TOA?
- A. You would have to give me a specific situation for me to be able to answer.
- Q. Well, you can speculate as you speculated in your previous answer.
- A. Well, I think that you can go back over a large number of votes and maybe question why votes came out sometimes the way they did.

MR. OLIVER: No, I think what he is asking is, wouldn't the TOA membership be subjected to the same type of thing because they might have a side-by-side

operation or guaranteed salary or furnished employees or furnished equipment free and all that stuff.

#### A. TOA?

MR. OLIVER: Yes.

A.

I don't know of any situation that---

- Q. You don't -- what about being employed, for example, by Dr. Bowen or perhaps Dr. Friedman?
- A. Being employed and working for them, I would think that that could apply.
- Q. So in fact there is really -- would you like to reconsider your answer to the question of how is the public served by having four members of the Texas Optometric Association on the Board?

MR.OLIVER: Do you want to reconsider your answer?

- A. Well, I think I will let it stand. I think rather than -- I would say it would be best served when individuals on the Board have no financial control by any outside interest, no possibility.
- Q. In other words, you say no possibility of any economic interest in the industry?
- A. No. Someone that could have economic control over them. For instance, say a private individual, a solo practitioner, for instance, not an employee, just a solo practitioner with nobody, no financial control over them.
- Q. And of course that financial control could be exercised over a TOA member, could it not?

#### A-269

- A. But not the individual, not the private practitioner, the solo individual.
- Q. Well, the TOA member who is, let us say, affiliated with other members?
- A. I would think in that situation, yes.
- Q. So that there is no guaranty of not having a control situation in the case of a TOA member as well as a non-TOA member, is that correct?
- A. Unless they are in solo practice.
- Q. The provision in the statute does not restrict the Board members to a solo practice situation, does it?
- A. No.
- Q. It just restricts it to being four members of the TOA?
- A. Right.
- Q. So that your statement how -- or your answer to the question how is the -- could the public possibly be adversely affected or, rather, how could they be served by having a majority of TOA members, the only way they could be served in your statement is if the four TOA members were solo practitioners, is that correct?
- A. Or if they are in partnership with---

MR. OLIVER: If they have equal say.

- A. Yes, where they have equal say.
- Q. I don't follow you.
- A. Where they could not exert control over one or the other.

- Q. So really it is not related to TOA membership at all; it is just the independence from outside influence, is that correct?
- A. Say it again. I think that is what I am trying to say.
- Q. In other words, the question is not whether a person is a member of the TOA or not a member of the TOA; it's just simply a question of whether the person, the Board member, is subject to control by outside influence---
- A. Yes.
- Q. ---is that correct?
- A. Yes, that's correct.

#### A-271

# [In the United States District Court for the Eastern District of Texas]

#### DEPOSITION OF DR. JOHN BOWEN

# [10]

- Q. How long have you operated with these assistants?
- A. It has been an evolution. We have been trying to get a smoother operation. We have had always employees, but the assistants started, oh, sometime last year.
- Q. Do the assistants facilitate the examination process?
- A. In the flow of patients, right.
- Q. Does it cut the amount of time that you have to spend with each individual patient?
- A. It is not in that way. It's just patient flow.
- Q. Do you still see the same number of patients?
- A. Approximately.
- Q. What number is that on a daily basis?
- A. It varies so I couldn't even tell you. Depends on -- see, we each have a different setup. We are a little bit different than anybody else around because I primarily do nothing but soft lenses with a few refractions and spectacles, so my situation is -- it varies so much during the day. It is checkups, progress checks on soft lenses and fitting soft lenses, et cetera.
- Q. What is your examination charge for soft lenses?
- A. \$325.

- Q. Is that the total package?
- A. That's the total deal. We don't have an examination fee for contact lenses.
- Q. What is your total fee for hard contacts?
- A. 250.
- Q. And that's the total package?
- That's the total deal.
- Q. What if a fellow comes in there and doesn't need contacts?
- A. Doesn't need contacts?
- Q. Right.
- A. What do you mean?
- Q. Well, if he comes in there and has spectacles and thinks he wants contacts, you perform an examination and decide he can't successfully wear them?
- A. Then it's just a regular examination fee.
- Q. What is that?
- A. You see, I don't ever quote a fee so you will have to let me -- bear with me a minute, and I really don't keep up with what that it, but I think the latest one is that -- well, for a full examination, not contact lenses, now, mind you, just---
- Q. Eyeglasses?
- A. Just what we call a visual analysis is 27 for somebody over 20, 21 -- below 21 we do not do the sphygmometer on so it is five dollars less, so that's

#### A-273

- 22, and if they are over -- eight and under, it's 16.
- Q. All right. Let me go back so I may be sure I understand it. A child eight years old or younger is \$16?
- A. 16.
- Q. Between eight years and 21 years?
- A. 22.
- \$22, and then over 21 the fee is \$27?
- A. 27 if we do a full situation. That's not an office call.
- Q. I don't understand that.
- A. In other words, we are talking about a full examination. If they come in and it is -- maybe they were seen six months ago and it's for a progress check, we don't do a full examination. We have seen them, you know, in a prior time.
- Soft contacts are 325?
- A. That's right.
- Q. And your hard contacts?
- A. 250.

\*

- Q. Now, how many progress checks does that include?
- A. Six months' service, and they vary. I hate to say. But there is not an additional charge for that until after six months.
- Q. And then what is the progress check after that?
- A. \$10 for the soft lens.
- Q. How did you arrive at this fee structure?

- A. That's what we wanted to charge.
- Q. But what went into the -- what components go into arriving at it?
- A. That's what we think it's worth.
- Q. Well, how do you arrive at worth?
- A. How do you arrive at worth? I mean we decide it's worth that much; that's what we charge. You know, it is a free country.
- Q. Well, can you tell me the factors that you consider in arriving at worth?
- A. I don't think I -- I can't. I mean not -- that's a nebulous statement, what is worth.
- Q. Do you consider difficulty or novelty of the services you render?
- A. Experience and knowledge and that's all I can -- you know, I mean, your background.
- Q. Do you consider competition?
- A. No.
- Q. What is or is not generally comparable for like services charged in the area?
- A. Of course we are higher than everybody in Lubbock.

# [14]

- Q. How much higher are you than other people in Lubbock?
- A. I really don't know but I do know we are the high.

- Q. How do you know that?
- A. I have just heard fees discussed at society meetings, and they vary, but as I said, normally they are \$300 and we are three and a quarter.
- Q. You are talking now about contacts?
- A. Yes.
- Q. What about examination fees?
- A. I don't have any idea what they charge.
- Q. Was there any reason why you are \$25 higher than someone else on contact lenses?
- A. Because I think we do a better job.
- Q. Do you sell the same product?
- A. I don't sell a product.
- Q. You don't manufacture contact lenses either, do you?
- A. No.
- Q. You are selling a patient -- providing to the patient the same contact lens that somebody down the street is?
- A. No, it depends on what lens you wind up with. That's the secret. There is a lot of lenses.

#### A-276

# [In the United States District Court for the Eastern District of Texas]

# Deposition of Dr. Sal Mora

# [7]

- Q. How long have you practiced at that location either as a single-door or as a two-door operation?
- A. Since about 23 years.
- Q. All right. Now, at the time and right before you converted to a two-door, were you the only optometrist in the office?
- A. Yes, sir.
- Q. Did you examine eyes?
- A. Yes, sir.
- Q. Did you prescribe lenses?
- A. Yes, sir.
- Q. And then did that office also fill the prescription and dispense it?
- A. Yes, sir.
- Q. At the time you converted from a single-door where the optometrist and the dispensing optician were in the same office, when you converted from that to a separation of the optometrist and the optician, did the patient experience an increase in cost for his eye examination and glasses?

# A. Well --

MR. OLIVER: Did you say for his eye examination and glasses?

#### A-277

- Q. Yes, the total package. Did it cost him more?
- A. Yes.
- Q. And what basically was the difference in the cost?
- A. The patient started paying separate for the examination.
- Q. Previously when the optometrist and the optician were in one office there was just one charge, is that correct?
- A. One charge.
- Q. Then after the separation there became two charges?
- A. Yes.
- Q. Now, after the separation the patient ended up paying more money?
- A. Yes.
- Q. All right. Now, can you tell the court what the difference in the total cost to the patient was after the change? I don't mean in dollars but was it related to something specific?
- A. I don't understand what you mean.
- Q. Well, was the difference substantially the
- A. I don't understand what you mean.
- Q. Well, was the difference substantially the -- did the patient pay substantially the examination fee, was that the additional charge that he ended up paying?
- A. Yes.

- Q. Do you presently have a normal examination fee?
- A. Yes.
- Q. And what is that, Dr. Mora?
- A. \$10.
- Q. \$10. And has that been true for several years?
- A. No. it hasn't.
- Q. Has it been true ever since you have been separated from the opticianry?
- A. No. it hasn't.
- Q. When you first separated from the optician side do you recall what your examination fee was?
- A. We started at five dollars.
- Q. All right. So that when you were operating as a single-unit optometrist and optician in one door, let's say the patient paid \$20 for a pair of glasses. After you converted to two-door then the patient paid 25, is that what I understand?
- A. More or less. See, all these prices have fluctuated due to inflation.
- Q. I understand, but at the time you made the change the patient's cost went up about the cost of the examination?
- A. Yes.
- Q. All right, sir.
- A. But what I meant, price -- part of this increase was brought, being due to inflation of the times.

#### A-279

- Q. I see. Then likewise your examination fee has gone from five to ten dollars?
- A. Yes.
- Q. So has bread and milk and ice. Now, Dr. Mora. there has been and will be further evidence in this case that within the profession of optometry in Texas there are basically two factions.
- A. Yes.
- Q. One of them we will say represented by TOA, and one of them represented by others.
- A. Yes.
- Q. To your knowledge, as a member of the profession. how long have these factions existed?
- A. Well, I guess they existed as long as I can remember.
- Q. All right. What do the factions basically dispute over?
- A. The main difference is -- I believe it's advertising.
- Q. All right. Is there any dispute that you observe over the proper way to examine the patient's eyes?
- A. Yes, I believe there was,
- Q. Is there now?
- A. Not now, I don't believe.
- Q. Is there any dispute over the prescription that should be provided a patient for a particular eye disorder?
- A. You mean now?

- Q. Yes.
- A. I don't think so.
- Q What does the dispute center on if it doesn't center on patient care?
- A. Mostly on the mode of doing business.
- Q. Now, as a member of the Optometry Board for the last five or six or seven years, has this dispute arisen within the Board itself, that is, between the two factions?
- A. In what sense?
- Q. Have there been some divided votes, basically four to two votes on certain issues?
- A. Yes.
- Q. And what basically have those issues been related to?
- A. For the same reason I gave. It is the mode of doing business.

\* \* \*

# A P P E N D I X VOLUME IV

Supreme Court, U. S.
FILED

JUN 8 1978

MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1977

No. 77-1163

E. RICHARD FRIEDMAN, O.D., et al.,

Appellants

VS.

N. J. ROGERS, O.D., et al.,

Appellees

No. 77-1164

N. J. ROGERS, O.D., et al.,

Appellants

VS.

E. RICHARD FRIEDMAN, OD., et al.,

Appellees

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION, INC., et al.,

Appellants

VS.

N. J. ROGERS, O.D., et al.,

Appellees

Appeals From The United States District Court For the Eastern District of Texas

No. 77-1163 Filed February 16, 1978

No. 77-1164 Filed February 16, 1978

No. 77-1186 Filed February 21, 1978

Probable Jurisdiction Noted April 17, 1978

# IN THE

# SUPREME COURT OF THE UNITED STATES

# October Term, 1977

No. 77-1163 No. 77-1164 No. 77-1186

# Appeals from the United States District Court for the Eastern District of Texas

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#### A-281

### [In the United States District Court for the Eastern District of Texas]

#### DEPOSITION OF DEAN CHESTER PHIEFFER

#### [44]

- Q. And it is your testimony that the practices of optometry and law are alike because the lawyer is selling paper clips and the optometrist is dispensing spectacles?
- A. Because they both claim to be a profession.
- Q. Is there any other likeness that would justify this comparison other than the paper clip dispensed by the lawyer?
- A. Oh, I would think less in the law as there is in medicine and dentistry, of course, in that medicine and dentistry are primarily concerned, as are optometry, with health care. I am not sure that lawyers consider themselves to be primarily concerned with health care.
- Q. Well, you made the comparison of trying to compare optometry with law or medicine.
- A. No. I said the profession as a professionalism says that the advertising or solicitation of patients is not professionalism as said by lawyers. Therefore, if they say what professionalism is, you are asking me what is professionalism, I say we have that kind of commonality.
- Q. You would agree in optometry, as has been true from the outset, there is a direct product associated with the profession of optometry.
- A. Not always, but a great deal of the time, yes.

- Q. Largely so, is there not?
- A. A fair larger part of the time, and not always in children. It is particularly not so.
- Q. And that associated with that product from optometries inception in the 1920's.
- A. I am sorry. Say that again.
- Q. Associated with that product since the inception of optometry, whenever it was, has been advertising of that commodity or product.
- A. No. Optometry began around 1890 when the apprentice and some ophthalmologists got into the furor. The furor was over the fact the apprentice was charging three dollars for an examination fee and putting the emphasis upon the examining and upon services and not upon materials. And optometry has been since that time trying to move into the professional sphere. Now, there has been a great deal of problem in it so doing, but that has been its goal.

#### [84]

- Q. Well then, I construe your answer to be that your concern is not to provide these services at the lowest possible cost.
- A. I don't know quite how one would do what you are saying in terms of each individual considering his own value. Your emphasis is upon material as I feel my emphasis is upon services.
- Q. I am referring to the entire package, both of services and materials, because that is the end result.

- A. I beg to differ with you. The end result as far as the optometrist is concerned should be that prescription which he writes.
- Q. Well, do you agree with me that most optometrists in Texas dispense their own --
- A. Yes.
- Q. And derive some economic benefit from that dispensing?
- A. Yes.
- Q. Whether it is in the form of a service fee or a product charge?
- A. Yes.
- Q. And so in the end the patient is getting a bundle and that bundle is mixed with service and product, is it not?
- A. Yes, but that doctor may and I guess again we have got a wide variety of approaches to that problem, that we would hope that doctor would charge for his services according to how he values himself, or what he considers his worth, and that he will provide his materials essentially at cost, which is what we try to teach our students, so that the emphasis is not upon that material cost.
- Q. But upon the professional worth of the service?
- A. Right.
- Q. And the doctor establishes in your mind that worth.
- A. Well, I am sure you do the same. Every professional person does that same.

#### [90]

- Q. Well, of the 900 or so optometrists practicing in Texas, you cannot name five percent who do not dispense their own materials?
- A. How many is five percent? Forty?
- Q. Forty-five.
- A. That may be. I don't know. I have not been around the state to find out, but I would say in the next five years you would find more and more of them.
- Q. The reason they do dispense, it is necessary for the economics of their --
- A. I challenge that statement.
- Q. You do not agree?
- A. I do not agree.
- Q. What facts do you have to show that it is not --
- A. There are men in the state now who are practicing without dispensing, and more and more of them are doing so each year.
- Q. Can you give me the names of as many as ten?
- A. Yes, Dr. ten? No, I can't.

[94]

Q. But the optometrist himself as an optician realizes a gain from the dispensing of the product because of the fitting fee that is attached. A. He has a technical service fee, yes. He moves over to a technical or technician level at that time.

\* \* \*

#### [In the United States District Court for the Eastern District of Texas]

#### DEPOSITION OF DR. NELSON WALDMAN

[7]

- Q. Were you active in the legislative fight for the passage of the 1969 Optometric Act?
- A. Yes, sir.
- Q. Were the statements and reasoning that you have just summarized conveyed to members of the House and Senate?
- A. Yes.
- Q. During the 1969 session?
- A. Yes, they certainly were.
- Q. By whom?
- A. By many members of the Texas Optometric Association.
- Q. Generally speaking, do the members of the TOA act as their own lobbyists?
- A. Yes, they do.
- Q. As chairman of the Board of TOA at that time, were you personally aware that the optometrists from the State were communicating this information to the members of the Legislature?
- A. Yes, I was.
- Q. Did your association actively support the passage of the bill as it finally passed?

A. Yes, we did.

[39]

- Q. In your opinion does membership in TOA render, generally speaking, a doctor more likely to emphasize quality eye care rather than volume or price?
- A. Yes.
- Q. Does membership in TOA in your opinion result in a doctor being more free from controlled and outside pressures?
- A. Yes.
- Q. Thus more likely to enforce the provisions of Section 5.09 and 5.10?
- A. Repeat that, please.

(Whereupon the last question was read by the Court Reporter.)

A. Yes, I would say so.

MR. NIEMANN: I have no further questions.

MS. PRENGLER: I just have two or three.

#### EXAMINATION BY MS. PRENGLER:

Q. Dr. Waldman, earlier you testified that you knew of many instances where optometrists had contacted members of the Legislature and talked to them about problems, for example, problems with price advertising before the passage of the Statute in 1969. Do you remember the names of any of the specific legislators? Can you give us an idea how

- prevalent this was, whether it was isolated instances?
- A. No, it wasn't isolated at all. As as a matter of fact, I would say that members of the Texas Optometric Association talked to probably every single one of the legislators at that time, even the ones that they knew were probably going to be opposed.
- Q. During the time that you were chairman of the Texas Optometry Board, how many members were on the Board who were not members of the Texas Optometric Association?
- A. Two.

#### [45]

- Q. Do you have any statistics upon which you can base such an answer?
- A. I don't know that I have statistics; I have impressions.
- Q. You said that a young optometrist graduating from school could either join a club or he could join a church or send out announcements or take other steps so as to "get known." What other steps would he normally take to become known so that he can attract patients?
- A. Well, he might play golf or he might join a bowling league. There are any number of things of this nature that he might do.
- Q. Do those activities promote quality practice of optometry?
- A. No, they certainly don't.

- Q. Joining the Optomists Club is not going to do anything to advance the cause of the profession of optometry, is it?
- A. I don't think that was your question. I thought your question had to do with starting a practice.
- Q. My question is, if a young man has got to spend his time working in the community and joining clubs, playing golf, that's not advancing the professional practice of optometry, is it?
- A. No, that's true, because you must realize, Mr. Keith, that at that point in a person's career he has a great deal of time.
- Q. The reason he has a great deal of time is that he doesn't have very many patients?
- A. Right. He is not very well known at that point.
- Q. You don't tell me that the optometrist is better off because he is going to the Optomists Club meeting rather than serve a patient whose visual needs --
- A. I don't think I said that. Did I say that?
- Q. That's certainly the implication. If he has got to go to the Optomist Club, he can't sit there and tend to his patients, can he?
- A. I don't think that I said that, did I? I would like to have that -- would you repeat that for me.
- Q. I don't recall your saying it. That's a direct implication of what you said.
- A. I don't think it's an implication of any kind. Would you please tell me how you arrive at that implication?

- Q. I will ask the questions and you will answer them. If you don't want to answer them, just say so, the Court can take that up. Just tell me how joining the Optomists Club can foster or improve the professional practice of optometry.
- A. Mr. Keith, I didn't say that. What I said to you, I believe, was that a young man getting started in practice, in order to have a practice, in order to have patients, must make himself known. People are not going to come to him if they don't know him. Joining the Optomists Club or joining any other club is a means of getting himself known.
- Q. Whereas, if were allowed to advertise, that would also be a means of communicating to the public the fact of his presence, his so-called skill?
- A. It most certainly would.
- Q. And that would be a means of becoming better known?
- A. Yes, it would.
- Q. Yet that means, would it not, Dr. Waldman, would challenge the status quo of the practitioners already located and well known in the community?
- A. I am not sure I understand your question.
- Q. Well, you are hypothetically an optometrist in a community.
- A. Right.
- Q. And are well established and thus, "well known."
- A. All right.

- Q. A young qualified and competent man comes to town. He is not well known. The moment that he commences to advertise and attract patients, then he is challenging your established position in that community, is he not?
- A. I don't consider it that at all.
- Q. You said that if the optometrist advertises, that this results in an increased cost to him. That's true, is it not?
- A. I would think so.
- Q. Whatever money he spends on advertising would be an increase in cost?
- A. I would think so.
- Q. And that he must compensate for this either by increasing his charge to the patient or by seeing more patients so as to make up for that additional cost, is that correct?
- A. I would think so.
- Q. That's what you testified to?
- A. Yes, sir.
- Q. Now, a third event could occur, could it not, and that is, he could reduce his margin of profit?
- A. I suppose that's a possibility.
- Q. And that would not result in any increased cost to the patient, nor would it result in any increased pressure on him to conduct this volume type practice?
- A. I don't agree with that, Mr. Keith, because I think that if a man were put in this position where he were

forced by his overhead, by his advertising cost to reduce his "margin of profit," the net income—whatever you want to call it. If he were forced by these pressures, then he would necessarily have to see a great deal more people in order to make the same living, and by virtue of the fact that he had to see so many more people, he couldn't possibly give as much time to those that he sees.

- Q. Well, implicit in your statement, is it not, is the proposition that he is entitled to this certain static amount of living, and he's going to get that either by seeing more people or charging more money.
- A. Well --
- Q. When in fact he can reduce that net earnings and not have to do either one.
- A. Human nature is very peculiar, Mr. Keith. In my experience people don't like to reduce their standard of living.
- Q. Where do you professional men get the idea that you have a right to a fixed income?
- A. I didn't say anything about professional people or fixed income. I said that people don't like to reduce their standard of living regardless of who they are, whether it's the ditch digger or the president of the United States. In my experience people don't like to reduce their standard of living, and they always aspire to a greater standard of living rather than a lesser one.
- Q. Are you suggesting to the Court that there is vice inherent in seeing a large number of people?
- A. No, sir.

- Q. Are you suggesting to the Court that every cost factor in an optometric practice that increases should be passed on to the patient or else compensated by increased volume?
- A. Say that again, would you?
- Q. If the price of rent goes up or the price of frames goes up or the price of laboratory work goes up, is that an item that you necessarily feel should be passed on to the patient?
- A. I think eventually this is true in most anything in our economy today.
- Q. Do you have a ground floor location in downtown Houston?
- A. Yes, I do.
- Q. On Main Street?
- A. No.
- Q. On Fannin?
- A. Yes.
- Q. Is your rent substantially greater than it might be if you were up on one of the upper floors of a building?
- A. Possibly.
- Q. Does that result in an increased cost to your patient as compared to the cost that the patient would experience in an upper floor office building?
- A. I suppose that could be a factor.
- Q. What about the volume; does that affect the volume of your practice in that you are accessible to and visible to the patients?

- A. I don't know that it affects volume because there are only so many hours in the day.
- Q. Why did you choose that location and why do you remain there if it does not influence your volume?
- A. We are considering not remaining there. We are considering getting into a building some time soon.
- Q. How long have you been there?
- A. We have been in this location since 1962.
- Q. Now, are there a number of practical methods that can be employed to deliver eye care to members of the public without necessarily increasing the cost, such as more efficient operations, greater use of para-professionals, the deployment of personnel in a more effective way?
- A. Yes. There are some people who do this very thing and very effectively.
- Q. Normally those people would not as professional optometrists dispense their own spectacles, would they?
- A. There are many who do not.
- Q. And many who believe that by not dispensing, they can deliver quality eye care to a larger number of people at a lower cost?
- A. That's what they believe, I am sure.
- Q. And such economies as that exist in a variety of forms to a greater or lesser degree, is that correct?
- A. I would think so.
- Q. Would you tell me what precise steps the TOA has taken at any time you held any office to increase the

- number of persons who could be served and reduce the cost of that service insofar as it relates to eye care in Texas?
- A. Of course, the Texas Optometric Association has been very active through the years in providing that more people are served simply by virtue of the fact that the Texas Optometric Association is responsible for the establishment and, of course, the support both financially, physically, morally and many other ways of the College of Optometry at the University of Houston.
- Q. Did you know that Dr. Rogers was also a substantial contributor to that effort?
- A. I know that Dr. Rogers was a contributor, yes.
- Q. Now, what else has the TOA done besides support the formation and continued operation of the college?
- A. Of course, the College of Optometry creates many many more optometrists in this State than we normally might otherwise have, and if we have these more optometrists, then we are providing for more people to be given service.
- Q. What have you done to reduce the cost to the consumer or patient?
- A. I don't know that there was any specific cost-cutting idea involved.
- Q. You have dealt with these younger men who have consulted you as they try to enter into a practice, young men coming out of school that consult with you about the ways and means of establishing a practice.

- A. I have had that happen frequently, yes.
- Q. And you have been a member of the various societies from time to time within your profession?
- A. Not from time to time. I have been and am a member of the societies and associations, yes.
- Q. Would you tell the Court what position you take and that your organizations take with respect to suggested fees for various services performed?
- A. Well, the position of the Texas Optometric Association has been that fees should be charged for services, and materials de-emphasized, the cost of materials de-emphasized to the extent that many of the practitioners charge on the basis of a fee for service and materials at cost.
- Q. What do you say to the younger men in the profession with respect to the fee that should be charged for a normal eye examination?
- A. I have never advised anyone what to charge.
- Q. Are there any recommended or suggested fees for services promulgated by your society?
- A. No.
- Q. Have these been discussed?
- A. No.
- Q. Not at all?
- A. Not in dollars, no.
- Q. There is no and has been no recommended or minimum fee?
- A. No, not to my knowledge ever.

- Q. That's all I can ask --
- A. Yes.
- Q. -- is what you have experienced. What is your customary fee for an eye examination?
- A. My basic fee is twenty-five dollars.
- Q. Do you do contact lens dispensing?
- A. Yes.
- Q. What is your charge for the customary contact lens examination and dispensing?
- A. The customary fee is two hundred dollars, and that's an all-inclusive fee.
- Q. For hard contacts?
- A. Yes.
- Q. What with respect to soft contacts?
- A. The usual fee is three hundred dollars.

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- Q. What about the lens to be manufactured to that normal prescription?
- A. I am not sure what the cost would be. I would think probably something like this would be somewhere in the neighborhood of ten dollars.
- Q. So the difference -- iet's suppose that the lens cost was ten dollars and the frame cost was eight.
- A. Okay.

- Q. That's a total charge of eighteen dollars to you, whereas the service attached to that commodity would be a total of forty-five dollars, would it not?
- A. Well, Mr. Keith, I consider it all service. You see, it's analogous in my thinking to a broken leg. If you break your leg and you go to your orthopedist, he is going to put a cast on your leg. Now, he is going to charge you X number of dollars for the service that you receive. He is not going to break it down into so much for the cast and so much for the service. He is going to charge you X number of dollars for the service, and he is going to provide the cast. Now, as far as I am concerned, this is the very same thing.
- Q. Doctor, if I was examined and those lens frames were provided to me --
- A. I think you can have them back. As a matter of fact, you may need them.
- Q. Thank you. I don't recall the charge, but my memory is that it was forty-seven dollars. Then that's quite a difference to the seventy dollar charge that you have indicated would be your fee.
- A. You didn't come to me, Mr. Keith.
- Q. That's right. I went to Dr. Fahey on Orleans Street in Beaumont. What explanation or justification is there for the difference in the seventy dollar charge that you would make and the forty-seven dollar charge that Dr. Fahey of TSO makes?
- A. I don't have any idea about Dr. Fahey, and I can't answer for him. I don't know him.

MS. PRENGLER: Are you basing or assuming it was a forty-seven dollar charge? You are not testifying at this time?

MR. KEITH: I believe it was. I know it wasn't any more than that.

MS. PRENGLER: But you are not under oath.

MR. KEITH: I understand.

Assume that that was true, that it was forty-seven dollars, and I believe that it was, but I could be mistaken. Is there any fact or factor that would render your service thirty or forty percent more valuable?

- A. I don't know. Perhaps the doctor you are referring to, who I don't know, doesn't consider that his services are worth any more than what he is charging.
- Q. My question is, from the standpoint of the patient, is there more value derived from you service than --
- A. All I can tell you is this, Mr. Keith. I charge in my office what I consider to be a fair fee for the service provided, and I think it's pretty obvious that the people who come to me consider that we are charging fair fees because we have been relatively successful.
- Q. You would preserve also the right of Dr. Fahey to charge a fair fee?
- A. Of course.
- Q. Whatever that may be?
- A. That's his business.
- Q. But, now, from the standpoint of the patient is there more value that he derives from the seventy dollar charge than from the forty-seven dollar charge?

- A. I can't answer that, Mr. Keith. I don't know anything about the forty-seven dollar charge and what it includes.
- Q. Well, it included a complete eye examination and the dispensing of these glasses that I have worn a year or two.
- A. Yes, that's in your opinion, and I don't know of my own opinion. I can't have an opinion if I haven't been examined. If you would like to send me to Dr. Fahey to be examined and have him prescribe glasses for me, perhaps I can answer that question for you.
- Q. Doctor, let's suppose that I went to Dr. Fahey because I couldn't see or was having difficulty seeing. He prescribed these glasses, and I played tennis in them and flown in airplanes in them and done everything that a man does, inside and out, in these glasses, with perfect comfort and excellent visual results. As a layman I don't know of anything else he could have provided. I have no physical or health defects. I have been to my internist, so I have got no blood pressure or diabetes or glaucoma, iritis or anything else. What else could any competent optometrist have done other than provide me a set of glasses that allows me to see perfectly?
- A. Are you in a position to enumerate for me all the services that this doctor, whatever his name is, rendered? I can't answer that because I don't know what he did.
- Q. Well, he made a complete eye examination and prescribed a set of glasses.
- A. What do you call --

MS. PRENGLER: I am going to have to object to your continued testimony.

THE WITNESS: You will have to describe to me what you call a complete eye examination.

- Q. Well, he didn't give me any blood pressure test.
- A. Let me stop you for a moment, if I may. I am not trying to give you a bad time. I am trying to answer your question.
- Q. I am perfectly used to having a bad time.
- A. And I am not saying this facitiously in any way. If you would send me to Dr. Fahey and if he examined me and he examined me in a way that he considered a complete, thorough examination --
- Q. Customary examination?
- A. Whatever. And then you ask me this question, I would feel qualified and competent to answer your question; otherwise, I cannot. I cannot answer for anybody else.

MS. PRENGLER: Before you start asking a question, I am going to state my objection on the record to your testifying as to what type of examination you got unless we can get some sort of admissible and competent testimony to the effect.

MR. KEITH: Well, I know what he did, but I can't relate it to the O.D. and the O.S.

Dr. Waldman, let us suppose that you performed your usual, customary, thorough examination, whatever that may include, and that another practitioner whom we will identify hypothetically for these purposes as Dr. Fahey, performs the same, usual, thorough and customary examination; that each of you arrives at a diagnosis. It may or may not be the same, is that correct?

- A. That's correct.
- Q. Because yours is a profession and there is room for judgment?
- A. A great deal.
- Q. And there is no precisely accurate diagnosis?
- A. Okay.
- Q. Is that true?
- A. Yes.
- Q. But each of you prescribes the same lens and frames ground to the same prescription, and that the prescriptions are delivered properly compounded, centered and with the same quality materials. If one charges as much as twenty dollars more than the other charges to the patient, is there any reason—and I am just asking you to assume that is true. Is there any reason that you can give why, if it's your charge that is higher, why it should be or why the patient should pay the additional charge?
- A. The only answer that I can give to that question. Mr. Keith, is that it would seem obvious to me that the doctor charging the lesser fee would consider that his judgment wasn't as good, wasn't worth as much.
- Q. All right. Now, from the patient's standpoint what benefit does he derive from the greater charge or the person charging the greater fee?
- A. I am not sure that I understand where you are now.
- Q. You charge seventy, let us say, and hypothetically Dr. Fahey charges fifty for the same thing. What benefit does the patient get?

- A. Wait a minute. You said for the same thing?
- Q. That's correct.
- A. I don't agree that it's the same thing.
- Q. What is different?
- A. I don't know. Send me to Beaumont, or --
- Q. I asked you to assume a hypothetical examination, the examination is the same.
- A. I would have to conclude if everything were the same, that unless -- I don't know what. The fee would probably have to be much the same if everything were the same.
- Q. How can you justify the higher charge?
- A. I don't know anything about anybody else's charges, Mr. Keith. All I know is that my fees are what I consider to be fair, and my patients consider them to be fair, as well. What somebody elso does, I can't answer for.
- Q. By the same token, if a man charges less than you do, one has the perfect right to do that, does he not?
- A. Yes. Anyone has a perfect right just as lawyers have a perfect right to charge for their services, and I dare say that all lawyers' services don't cost the same thing.
- Q. That has been my experience, as well.
- A. And the same sort of thing could be applied, I would think.
  - MS. PRENGLER: You get what you pay for.
- Q. Is that what you are saying?

- A. I think that's the usually the case in our economy, isn't it?
- Q. And that the higher charge necessarily carries with it a greater service?
- A. I would think that it would carry a greater likelihood.
- Q. How can you, other than by polemics, justify this socalled fee attached to the dispensing of the lens when that is the service performed by an optician rather than an optometrist?
- A. No, it's not a service performed by an optician, Mr. Keith, because, first of all, the prescription has to be written, the lens has to be designed, the decision has to be made about the, for example, height of the segment, decentration, various other things that go into the lens. The lens has to be evaluated when it is finished. It has to be verified. There any many many things that go into the services in providing the lens.
- Q. This twenty-five dollar charge does not include your writing the prescription?
- A. The twenty-five dollar charge includes the examination itself up to the point of writing the prescription.
- Q. Now, let us suppose that I was your patient and wanted you to write my prescription, and I wanted to take it elsewhere to have it filled. Do I have that right?
- A. You certainly do.
- Q. Then do you charge me additionally to write the prescription?
- A. Yes, I do.

- Q. How much do you charge for that?
- A. Generally five dollars.
- Q. So that I could take the prescription and leave, and I would have paid you thirty dollars, is that correct?
- A. That's right.
- Q. And I would have gotten the examination, the prescription written. You would have designed the frame, you would have allowed for decentration, allowed for the height, size of the segment?
- A. All the information, all the pertinent information would be on the prescription, yes.
- Q. And then I can take it to TSO or wherever I want to take it and have it filled?
- A. Yes.
- Q. And I don't owe you any money?
- A. That's correct.
- Q. So, what are these other charges incidental to this frame and lens service besides writing the prescription?
- A. Well, I told you, Mr. Keith, that I think I enumerated a moment ago some of the other services.
- Q. You did, and all those are related to writing the prescription, are they not, decentration, size, height?
- A. No. You can't get the decentration on something like this unless you know the frame, and, also, under the circumstances I would simply be giving you a

- prescription and indicate if it were a bifocal, for example, the type of bifocal that I would recommend, and a pupilary distance.
- Q. After you had made the thorough examination that I am sure you make, with your knowledge and skill, how long does it take to write the prescription?
- A. It all depends on how complicated it is. It doesn't generally take a long time, but it requires a great deal of judgment.
- Q. I concur. If you took my glasses to write that prescription, once you had made the examination, it would take fifteen seconds, twenty seconds?
- A. I don't know.
- Q. Would it take that long?
- A. Actually writing down numbers doesn't take very long, if that's what you are getting at, but there's a great deal more involved than writing down the numbers.
- Q. It's the professional judgment that is of value?
- A. I would think so. You are a professional man, I would think you would concur with that.
- Q. When you were on the Board and you said there was this Investigating Committee, who were the members of that Investigating Committee?
- A. As I remember, Dr. Burton, Jack Burton was chairman of that committee.
- Q. Who else was on it with him?
- A. Dr. Cohen.

- Q. Three of you, Dr. Burton, Cohen and Waldman?
- A. I wasn't a member of the committee. As chairman I was an ex-officio member of all committees.
- Q. Were both of those committee members TOA members?
- A. Yes.
- Q. When these investigators went around and you all had these letters of reprimand and informal conferences with the licensees who were in violation of basic competency, did this include just -- did the people who you found to be violating the basic competency, were they exclusively non-TOA members?
- A. No.
- Q. Did they include TOA members?
- A. Yes.
- Q. You are not suggesting that they were violating basic competency because they were advertising?
- A. No.
- Q. Or that they were under some volumetric patient pressure?
- A. I would think that that would be more likely to happen, yes.
- Q. Well, were these TOA members under some volume pressure?
- A. No, I wouldn't think they were.
- Q. Now, you said that the principal violation or the

first in order of numbers was in Section 10 of Basic Competency, which relates to the peripheral vision. As a practical matter, isn't that about the simplest and less time consuming?

- A. Yes, exactly right.
- Q. It takes three seconds to do it?
- A. Less. That was the great surprise.
- Q. What is your explanation?
- A. I have none.
- Q. Would you say that's more related to human nature than it is mode of practice?
- A. Perhaps.

(Whereupon a short recess was had.)

MR. KEITH: I have no further questions. Thank you.

MR. NIEMANN: I do.

#### FURTHER EXAMINATION BY MR. NIEMANN:

- Q. Doctor, regarding the violations of the Basic Competency Rule when you were chairman of the Optometry Board, was the occurrence and severity of violations more prevalent when the doctor was under time and volume pressures?
- A. Yes.
- Q. Does your prescription-writing charge of five dollars include a lens verification service by your office, if and when the patient brings the glasses back for verification?

- A. Yes.
- Q. Is, indeed, that one of the purposes of the five dollar charge?
- A. Yes.
- Q. To encourage the patient to bring the lenses back for verification?
- A. Yes, it is.
- Q. Doctor, is the perfect examination and perfect judgment in writing the prescription all for naught if the lens is gound or fabricated incorrectly?
- A. Yes, it is.
- Q. Does the five dollar charge, which includes lens verification, encourage the patient to have the lens verified by your office?
- A. Yes.
- Q. Is the reason that he has already paid for it, and, therefore, he doesn't want to lose the benefit of something for which he has already paid?
- A. I would think so.
- Q. Do you explain to your patients the advisability and the necessity of bringing the lens to your office for verification?
- A. Yes, I do.
- Q. Doctor, earlier when we were discussing the dangers inherent from incorrectly ground prescriptions, we concentrated mainly on eyeglasses rather than contact lenses. Could you briefly enumerate for us some of the physical health

dangers that can occur from improperly manufactured or improperly fitted contact lenses?

- A. Well, under these conditions there can be things like abrasions of the cornea and irritations of the lids that can be very unpleasant and very uncomfortable and sometimes dangerous as well.
- Q. You mean there's a risk of infection and permanent damage from incorrectly --
- A. Yes, there is always that possibility.
- Q. Is this accentuated when there is a de-emphasis on follow-up care following the initial fitting of the contact lenses?
- A. I would think so.
- Q. Is this one of the reasons why contact lenses are generally higher in price than eyeglasses?
- A. The additional service required, the additional time required is the reason, yes.
- Q. Now, when a doctor is under a time and volume restraint, is there a tendency or is there pressure to relegate this follow-up care and follow-up examination to non-optometric personnel?
- A. Often that's true.
- Q. Is this one of the shortcuts or eliminations that can occur and do occur where a doctor tries to increase volume?
- A. I suppose that's possible. We don't do this in our office.
- Q. I am talking about from your experience as a Board member, seeing violations of the Basic Competency

Rule and other violations of good optometric care?

- A. I would think so, Mr. Niemann.
- Q. Since the danger of permanent damage to the eyeball and damage to the -- infection and irritation are so serious in contact lens cases, could you briefly outline for us the kind, nature and time involved of follow-up care in contact lens cases?
- A. Well, I routinely in my office, for example, see a patient for examination. I have him back to dispense the contact lenses and give him the necessary instructions, and this takes usually an additional hour. Routinely I see him in a week for an evaluation, and routinely after that in two weeks later, routinely after that in three months, and then again at the end of six months. This is assuming that there are no complications, no changes necessary, that this is a perfectly -- this is a perfect type of case. Otherwise, we see people as often as it is necessary to see them to give them the protection and the vision that they need.
- Q. In your judgment is it imperative that this follow-up care be done by an optometrist?
- A. Yes, I think it is imperative. I think it's important. I think it is, and that's why I do it because I think that the judgment involved is very important here.
- Q. Is it your belief that if there is sufficient time and volume pressures, that the optometrist will be tempted to relegate that type of responsibility to a non-optometric personnel?
- A. I think yes. I think that's only part of it, though. I think that if there are time pressures and volume pressures, that he not only would be tempted to relegate this to other personnel, but I think that

there might be some elimination of some of these visits and some of the time.

- Q. Is this one way, by the elimination of certain steps and the relegation of follow-up care to nonoptometric personnel? Are these ways in which contact lens' total prices can be reduced?
- A. I suppose they could be.
- Q. About how many members are there in the student body of the University of Houston School of Optometry?
- A. Currently there are, I believe -- let's say currently before the last graduation I believe there would be somewhere between two hundred fifty and three hundred students. That's going to increase, however, in September because they are going into a new building that will accommodate more students.
- Q. If the membership of TOA had been afraid of competition, would they have actively supported the creation of the school?
- A. Mr. Niemann, not only was the membership of TOA not afraid of competition, we have virtually encouraged competition, encouraged young people. We recruit for the schools. I was chairman of the American Optometric Association's Vocational Guidance Committee for several years, and it was my duty to recruit students over the nation to go to the colleges of optometry throughout the nation, and certainly if we were trying to stifle competition, we wouldn't be doing this sort of thing at all.

MR. NIEMANN: No more questions.

MS. PRENGLER: I only have one question.

#### FURTHER EXAMINATION BY MS. PRENGLER:

- Q. For the most part, would you say that the more time that you spend with a patient and the higher degree of skill that you feel the service you're providing for the patient requires, the higher your fee will be?
- A. I am not sure that -- I think that I understand your question. I am not absolutely sure, but what I had been trying --

MR. KEITH: May I ask by that if you mean his fee is tied to the level of skill and time that he devotes?

MS. PRENGLER: Right.

MR. KEITH: Then it would vary depending on the patient?

MS. PRENGLER: Right.

THE WITNESS: I think that what I am trying to say to you is that the fee is determined to a great extent by the length of time that is spent, yes, simply because there are so many hours in the day, and if I could see four times as many patients in a given time, it's probably true that my fee would be less, but it's also true that the patients wouldn't get the time and attention and the care that they get under the circumstances.

- Q. But your fees would vary from case to case with the factor or time and skill playing an important role in what the ultimate fee would be?
- A. Yes.
- Q. Okay. That's all.

#### A-314

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

DR. N. JAY ROGERS	§	
VS.	§	CIVIL ACTION NO B-75-277-CA
DR. E. RICHARD	§	
FRIEDMAN, ET AL	8	

#### NOTICE TO TAKE DEPOSITIONS BY WRITTEN INTERROGATORIES

Notice is hereby given that the Plaintiff will take the deposition of Dr. Lee Benham, 6346 Waterman Street, St. Louis, Missouri 63130 on April 26, 1976, by written questions before Mr. Robert D. Perry, 703 Cranbrook Drive, St. Louis, Missouri 63101. The questions are attached.

1400 San Jacinto Building Beaumont, Texas 77701

#### CERTIFICATE OF SERVICE

The above and foregoing instrument was delivered to opposing counsel by U.S. Mail, Certified, return receipt requested on the 16th day of April, 1976.

#### A-315

#### WRITTEN INTERROGATORIES

TO: Dr. Lee Benham, 6346 Waterman, St. Louis, Missouri 63130

- 1. State your name, age and residence address.
- 2. By whom are you employed?
- 3. What is your occupation?
- 4. What is your educational background?
- 5. What is your employment background?
- List any professional organizations or associations of which you are a member.
- List by title, name of publication, publisher, date, place of publication, and co-authors each article or paper which you have authored.
- 8. Have you participated in or conducted any studies with respect to the disciplines of optometry, opticianary, the dispensing of opthalmic supplies, or the provision of optical goods and services?
- 9. Describe each of such studies in detail.
- 10. Have you written any papers, whether published or unpublished, on the disciplines of optometry, opticianary, the dispensing of opthalmic supplies, or the provision of optometric goods and services?
- 11. If you have written any such papers, attach a copy of each to this deposition.
- 12. If you have testified in any judicial proceedings, please list: the style of the case, the court and the party or agency who called you as a witness.

- 13. (a) Upon the basis of your studies and investigations, do you have an opinion as to whether or not there is a correlation between commercial advertising, or the lack thereof, and the retail price of optometric goods and services?
  - (b) What is your opinion?
  - (c) What is the reason or basis of such opinion?
- 14. Is the use of a commercial trade name, such as "Texas State Optical" a form of "commercial" advertising?
- 15. (a) In your opinion, based upon your studies and investigation, will there be a correlation between the elimination of commercial trade names and the price at which persons can obtain optical goods and services at retail in Texas?
  - (b) What is your opinion?
  - (c) What is the reason or basis of such opinion?
- 16. From the vantage point of a professional economist, what purpose does a trade name serve in the field of optometric services and products?
- 17. What type of information, if any, does a trade name communicate?
- 18. (a) In your opinion, will elimination of the use of a trade name from the practice of optometry in Texas effect the consumer of optometric goods and services?
  - (b) In what way will the consumer be effected?
  - (c) Why?
- 19. (a) In your opinion, will elimination of the trade

name from the practice of optometry in Texas effect the present users of trade names within optometry?

- (b) In what way?
- (c) Why?
- 20. In your opinion, will elimination of the trade name from the practice of optometry in Texas effect the practitioners of optometry who do not now use a trade name?
  - (b) In what way?
  - (c) Why?
- 21. (a) In your opinion, will the state-enforced separation of the optometrist from the opticianary wherein he has traditionally practiced under a trade name effect the consumer of optometric goods and services in Texas?
  - (b) In what way?
  - (c) Why?
- 22. (a) In your opinion, will the state-enforced separation of the optometrist from the opticianary wherein he has traditionally practiced under a trade name effect the present users of trade names?
  - (b) In what way?
  - (c) Why?
- 23. (a) In your opinion, will the state-enforced separation of the optometrist from the opticianary wherein he has traditionally practiced under a trade name effect the practitioners of optometry who do not now use a trade name?
  - (b) In what way?

- (c) Why?
- 24. (a) Have your studied the activities of "professional associations" within the field of optometry?
  - (b) Have you studied the activities of the American Optometric Association (AOA) and the state associations affiliated with it?
  - (c) Based upon your studies, what have the associations done?
- 25. (a) Do you have an opinion of whether there is any correlation between the provision of quality eye care products and services and the use or not of a commercial trade name?
  - (b) What is your opinion?
  - (c) What is the basis of your opinion?
- 26. As a professional economist who has studied and reported upon the price and provision of optometric goods and services, do you have an opinion as to the overall consequences of the prohibition of the use of trade names in the practice of omptometry in Texas?
  - (b) What is that opinion?
  - (c) What is the basis of your opinion?
- 27. Are you familiar with or have you been in any way associated with or employed by Texas State Optical?

MEHAFFY, WE	BER,	KEITH
& GONSOULIN	V	
Attorneys for Pla	intiff	

By	
-,	Of Counsel

1400 San Jacinto Building Beaumont, Texas 77701

## IN THE UNITED STATES DISTRICT COURT IN AND FOR THE EASTERN DISTRICT OF

#### TEXAS

#### BEAUMONT DIVISION

DR. N. JAY ROGERS	X
VS.	CIVIL ACTION NO.
DR. RICHARD E.	)( B-75-277-CA
FRIEDMAN, ET AL	χ

### CROSS INTERROGATORIES TO BE PROPOUNDED TO DR. LEE BENHAM

- TO: Dr. Lee Benham, 6346 Waterman, St. Louis, Missouri 63130.
- 1. Dr. Benham, are you familiar with the Texas Optometry statute which requires an optician to obtain an advertising permit and to accurately advertise prices in various categories of eyeware that he or she provides?
- 2. If you are not, would you please briefly examine the enclosed copy of Article 4552, Section 5.10, attached as Exhibit "A", which deals with advertising permits and which was enacted in 1969?
- 3. (a) In your opinion, is it beneficial for consumers to be furnished with prices in all categories as required by the Texas statute which has been furnished to you?
  - (b) If your answer is no, state your reasons why.
- 4. (a) In your opinion, does disclosure of prices in various categories better inform the consumer

- of possible price ranges of eyeware than if only one price or one category were advertised?
- (b) If your answer is no, state your reasons why.
- 5. (a) In your opinion, does disclosure of prices in the statutory categories in media advertising lessen the chance for "bait and switch" advertising?
  - (b) State your reasons for your answer.
- 6. (a) In your opinion, does media advertising by opticians tend to encourage the consumer to go to the advertising optician first rather than the optometrist or physician first, in seeking eyecare?
  - (b) If your answer is no, state your reasons why.
- 7. (a) Generally speaking, does advertising increase the overhead expenses of the optician, optometrist, or physician who advertises?
  - (b) If your answer is no, state your reasons why.
- 8. (a) Generally speaking, does advertising by opticians tend to require a higher volume of sales of eyeglasses to justify advertising in newspaper and television?
  - (b) If your answer is no, state your reasons why.
- 9. (a) In your opinion, if an optometrist is employed by an optical or another optometrist who advertises regularly, is it more likely that his employer would emphasize a high volume of sales of eyeglasses than if the optometrist was employed by an optician or optometrist who did not advertise.

- (b) State your reasons for your answer.
- 10. (a) In your opinion, if an optometrist is employed by an opticin or another optometrist who advertises regularly, is it more likely that his employer would emphasize speed of processing the sale of eyeware and/or the examination of the patient than if the optometrist was employed by an optician or optometrist who did not advertise.
  - (b) Why?
- 11. (a) In your opinion, if an examining optometrist is employed by an optician or optometrist who advertises regularly under a trade name, and the address of the examining optometrist and the advertising optician or optometrist are the same, are the examining optometrist's patients likely to come to him because of his personal reputation for professional competence as opposed to some other reason such as advertising?
  - (b) State your reasons why.
- 12. Are your aware that Texas State Optical and Lee Vision are the two largest retail optical supply chains in Texas?
- 13. Are you aware that Texas State Optical, although it can advertise under the Texas statutes, advertises in cities where it has offices, without ever mentioning prices or reference to price?
- 14. Have you ever made a study of the effect of advertising of eyeglasses with reference to price, as compared to advertising of eyeglasses without reference to price? If so, would you please attach copies of such study or studies.

- 15. Have you ever made a study of the effect of advertising on the quality of eyecare. . .such as the effect of advertising on the quality of lenses, accuracy of prescription grinding, and/or speed of examinations by optometrists associated with or employed by the optician or optometrist who advertises? If so, please attach a copy of such study or studies.
- 16. Could you give a brief explanation of why more recent data that 1963 was not used in your 1972 article entitled "The Effect of Advertising on the Price of Eyeglasses"?
- 17. In your article entitled "The Effect of Advertising on the Price of Eyeglasses," did you take into account the general consumer price index differences between the various states covered by the samples, for example, the difference between general consumer prices in Texas as compared to the general consumer price index in New York?
- 18. Were the prices reported in "The Effect of Advertising on the Price of Eyeglasses" adjusted to account for these regional differences in price indexes?
- 19. The conclusions reached in "The Effect of Advertising on the Price of Eyeglasses" appear to be heavily affected by the price samples obtained from the North Carolina survey. On the basis of the North Carolina samples, are eye examinations performed by physicians generally more expensive than eye examinations performed by optometrists in the same locale?
- 20. (a) Did the fact that 55.3% of all persons sampled in North Carolina obtained their eyeglasses from a physician tend to increase the cost of

- eyeglasses in the North Carolina samples as compared to your findings in the other states surveyed?
- (b) If your answer is no, why not?
- 21. What are the "other laws [in North Carolina] which would tend to raise prices independently of advertising regulations", which you referred to in "The Effects of Advertising on the Price of Eyeglasses"?
- 22. (a) In "The Effects of Advertising of the Price of Eyeglasses", you stated that "a few non-routine items (treatment) may have been included in the sample." If this was the case, were the North Carolina sample prices more susceptible to being effected by these "non-routine" items (treatment)" assuming only physicians were legally permitted to administer "treatment" to the eye?
  - (b) State your reasons for your answer.
- 23. Did the North Carolina data represent 42% of the total "advertising prohibited" data in "The Effects of Advertising on the Price of Eyeglasses"?
- 24. Did the state of North Carolina represent 16.6% of the sample states which prohibited advertising in the study referred to in question 24?
- 25. (a) If the North Carolina data were excluded from your sample, wouldn't the sample have the effect of "suggesting" only about a 13% increase in eyeglass costs rather than a 25% to 100% increase as stated in Section IV of "The Effects of Advertising on the Price of Eyeglasses"?
  - (b) If your answer is no, why?

- 26. (a) If the New York data were excluded from the samples, would it significantly affect the conclusions reached in "The Effects of Advertising on the Price of Eyeglasses"?
  - (b) State your reasons why.
- 27. In the conclusion of "The Effects of Advertising on the Price of Eyeglasses", did you state: "Several professors in economics and marketing at the University of Chicago were asked whether they thought the price of eyeglasses would increase or decrease if advertising were prohibited. Of those individuals polled, approximately 40% of the economists and 100% of those in marketing expected prices to be the same or lower if advertising was prohibited."
- 28. Do you believe each and every one of the marketing professors you polled was wrong in their opinion referred to above?
- 29. (a) Were there grant monies from one or more public or private sources used in the research, writing, and/or publication of "The Effect of Advertising on the Price of Eyeglasses"?
  - (b) If so, please name the source of those grant monies and include any institutional or governmental agency controlling, administering, or approving of such grant or grants?
- 30. (a) Please read the attached letter marked Exhibit "B" and assume it to be a complaint made to the Attorney General's Office in Texas. In your opinion, is this type of problem more likely to occur when a person's eyes are examined and contact lenses prescribed by an optometrist

practicing under a trade name than by an optometrist not practicing under a trade name?

- (b) If your answer is no, state your reason why.
- 31. (a) In your opinion, is a patient more likely to know the specific name of the individual optometrist who treated him or her when that patient goes to a self employed optometrist or when that person goes to an optometrist practicing under a trade name?
  - (b) Please state your reasons.
- 32. (a) You received a copy of these interrogatories several days prior to the actual taking of this deposition. Have you discussed either the questions or possible answers with the plaintiff, his agents, and/or his attorney?
  - (b) If so, whom did you discuss it with?

Respectfully submitted,

JOHN L. HILL

Attorney General of Texas

DOROTHY PRENGLER Assistant Attorney General

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RICHARD ARNETT Assistant Attorney General

P.O. Box 12548, Capitol Station Austin, Texas 78711 512/475-4721

Attorneys For Defendants In Their Official Capacities

#### CERTIFICATE OF SERVICE (omitted in printing)

#### **EXHIBIT "A"**

Section 5.10. Advertising by Dispensing Opticians. (a) No person, firm or corporation shall publish or display or cause or permit to be published or displayed in any newspaper or by radio, television, window display, poster, sign, billboard or any other means or media any statement or advertisement concerning ophthalmic lenses, frames, eyeglasses, spectacles or parts thereof which is fraudulent, deceitful or misleading, including statements or advertisements of bait, discount, premiums, price, gifts or any statements or advertisements of a similar nature, import or meaning.

- (b) No person, firm or corporation shall publish or display or cause or permit to be published or displayed in any newspaper, or by radio, television, window display, poster, sign, billboard or any other means or media, any statement or advertisement of or reference to the price or prices of any eyeglasses, spectacles, lenses, contact lenses or any other optical device or materials or parts thereof requiring a prescription from a licensed physician or optometrist unless such person, firm or corporation complies with the provisions of the Subsections (c)-(j) of this section.
- (c) The person, firm or corporation shall obtain from the board an "Advertising Permit," which permit shall be granted to any person, firm or corporation which is engaged in the business of a dispensing optician in Texas.

- (d) Such person, firm or corporation shall after receipt of such permit, but before beginning any such advertising, file with the board a list of prices which shall be charged for such eyeglasses, spectacles, lenses, contact lenses or other optical devices or materials or parts thereof in each and all of the following categories:
  - (1) single vision lenses;
  - (2) kryptok bifocal lenses;
  - (3) regular bifocal lenses;
  - (4) trifocal lenses;
  - (5) aphakic lenses;
  - (6) prism lenses;
  - (7) double segment bifocal lenses;
  - (8) subnormal vision lenses;
  - (9) contact lenses.
- (e) No change may be made in any such price advertisement until the change has been filed with the board.
- (f) Any advertisement or statement published or displayed as above described which contains the price of any of the categories shown above shall also contain the prices of all other categories and all such items, and the prices thereof, shall be published or displayed with equal prominence. No advertisement which shows the price of items listed in the categories shown above shall contain any language which directly or indirectly compares the prices so quoted with any other prices of similar items. In the event an "Advertising Permit" is issued to a dispensing optician there shall be displayed

prominently in each reception room and display room of each office owned or operated by such dispensing optician a complete current list of all prices on file with the board as provided above. In showing the price of "all other categories and all such items" as required by this section, it shall be permissible to combine two or more categories into one general category of "all other lenses" and designate the price thereby of "up to \$......." which represents the highest price of any lenses included within this combined (general) category. Should there be a category in which two or more price differentials exist, it shall be permissible for the category to have a single listing in the advertisement with the lowest and the highest price in the category designated.

- (g) In the event the dispensing optician owns more than one office, the prices for all such eyeglasses, spectacles, lenses, contact lenses or other optical devices or materials or parts thereof in the same category shall be the same in all offices located within the geographical limits of a county or a city regardless of the name under which such dispensing optician operates such offices.
- (h) All such eyeglasses, spectacles, lenses, contact lenses, or other optical devices or materials or parts thereof must conform to standards of quality as promulgated by the American Standards Association, Inc., and commonly known as Z80.1-1964 standards. (Continued on Page 45)

#### **EXHIBIT "B"**

April 29, 1967

To Whom it May Concern:

Recently I purchased a pair of contact lenses for my son, Morris, at Texas State Optical Company. It was not known to us who actually fitted the lenses, therefore when Morris experienced a painful condition in his eyes, as a result of wearing these lenses, we did not know who to call, since no one person's name had been made available to us. This painful condition became apparent after regular office hours, and since it grew steadily more painful, we found it necessary to call upon a local doctor in private professional practice, who up to this time was not known to us.

It is our considered opinion that a doctor in private professional practice, whose name and reputation is known to his patients, and to whom one can turn in a case of emergency, is better qualified to serve any and all persons who seek the benefit of proper professional vision care.

Very truly yours,

s/s Archie Ray Kelly

3028 Golfing Green Farmers Branch, Texas [In the United States District Court for the Eastern District of Texas]

#### DEPOSITION OF LEE KENNETH BENHAM

#### DIRECT INTERROGATORIES

TO THE FIRST DIRECT INTERROGATORY HE SAYS:

Lee Kenneth Benham, age thirty-five. I live at 6346 Waterman Avenue, St. Louis, Missouri.

TO THE SECOND DIRECT INTERROGATORY HE SAYS:

Washington University, in St. Louis.

TO THE THIRD DIRECT INTERROGATORY HE SAYS:

I am an economist.

TO THE FOURTH DIRECT INTERROGATORY HE SAYS:

My undergraduate training was in mathematics at Knox College in Galesburg, Illinois. My graduate training was in economics at Stanford University. I received a Ph.D. in economics at Stanford.

TO THE FIFTH DIRECT INTERROGATORY HE SAYS:

I was instructor and assistant professor of economics in the Graduate School of Business at the University of Chicago from 1967 until 1974. I have been an associate professor of economics in the Department of Economics and an associate professor of economics in preventive medicine in the Medical School at Washington University from 1974 until the present. In addition to my academic appointments, I have done consulting for the Department of Health, Education and Welfare

concerning proposed national health care programs, and the American Bar Association concerning the supply of and demand for lawyers and the impact of proposed changes in the educational requirements for lawyers.

#### TO THE SIXTH INTERROGATORY HE SAYS:

I belong to the American Economics Association and the Health Economics Research Organization.

#### TO THE SEVENTH INTERROGATORY HE SAYS:

"Migration, Location and Remuneration of Medical Personnel; Physicians and Dentists," *Review of Economics and Statistics* (August, 1968), with Alex Maurizi and Melvin Reder.

"Factors Affecting the Relationship Between Family Income and Medical Care Consumption," in "Empirical Studies in Health Economics, edited by Herbert Klarman (Baltimore; The Johns Hopkins Press, 1970), with Ron Andersen.

Readings in Labor Market Analysis, (New York: Holt, Rinehart & Winston, 1971), coeditor.

"The Labor Market for Registered Nurses; A Three Equation Model," *The Review of Economics and Statistics* (August, 1971).

"The Effect of Advertising on the Price of Eyeglasses," The Journal of Law and Economics (October, 1972).

"The Benefits of Women's Education Within Marriage," Journal of Political Economy, vol. 82, no. 2, Part II, March/April 1974. Reprinted in Economics of the Family: Marriage, Children and Human Capital, edited by Theodore W. Schultz (The University of Chicago Press, 1974).

"Health, Hours, and Wages," The Economics of Health and Medical Care, edited by Mark Perlman (London: Macmillan, 1974), with Michael Grossman.

"Women's Economic Returns from College, Graduate Education, and Nurses' Training Through Earnings and Marriage," in Sex, Discrimination and the Division of Labor, edited by Cynthia Lloyd (Columbia University Press, 1975).

"Price Structure and Professional Control of Information," *Journal of Law and Economics* (October, 1975) with Alexandra Benham.

"The Impact of Incremental Medical Services on Health Status 1963-1970," in *Equity in Health* Services, edited by Ron Andersen (Ballinger, 1975) with Alexandra Benham.

"Utilization of Physician Services Across Income Groups 1963-1970," in *Equity in Health Services*, edited by Ron Andersen (Ballinger, 1975), with Alexandra Benham.

#### TO THE EIGHTH INTERROGATORY HE SAYS:

Yes. I have.

#### TO THE NINTH INTERROGATORY HE SAYS:

In the first study, data on eyeglass and eye examination prices were obtained from a 1963 survey of a national sample of individuals. The prices paid for these services could be associated with the state of purchase. I was interested in comparing the prices paid by consumers in states with restrictions on advertising and in states without such restrictions. I became interested in this question because I grew up in Texas and was accustomed to the level of eyeglass prices there. When I moved to California, I was surprised at the much

higher prices for eyeglasses I observed there.

In the second study, done jointly with Alexandra Benham, I helped develop the questionnaire and code the data from a national sample of 10,000 individuals for 1970. In this study I was interested in pursuing the question of the effects of limiting information available to consumers on the prices consumers pay. Once again the prices consumers paid for eyeglasses could be associated with state of purchase. The states were classified according to several indices providing various measures of the restrictions placed on the availability of information about eye care providers in the state.

#### TO THE TENTH INTERROGATORY HE SAYS:

Yes. I have written two papers, one jointly with Alexandra Benham.

TO THE ELEVENTH INTERROGATORY HE SAYS:

The papers have been published in the Journal of Law and Economics. Copies are attached.

TO THE TWELFTH INTERROGATORY HE SAYS:

I testified in the case of Horner-Rausch Optical Company versus the Attorney General of Tennessee, in the First Circuit Court for Davidson County, Tennessee, concerning the restrictions placed on advertising of eyeglasses in that state. I was called as a witness by Horner-Rausch. I also testified in the case of Eckerd Optical Centers, Inc., versus the Florida State Board of Dispensing Opticians, in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida. This case was also concerned with restrictions on information to consumers about eyeglasses. I was called as a witness in this case by Eckerd Optical Centers, Inc.

TO THE THIRTEENTH INTERROGATORY HE SAYS:

(a) Yes, I have.

- (b) In my opinion, consumers generally pay substantially higher prices in states where commercial advertising is prohibited.
- (c) In the two studies described above and attached to this deposition, I found that in those states in which the commercial information which could be provided to consumers was more limited, the price consumers paid was substantially higher. Consumers benefit from having more information about their options. If they do not know about alternatives, they cannot respond to them. If the amount of information available to consumers is limited, it has the effect of reducing competition which results in higher prices to consumers.

### TO THE FOURTEENTH INTERROGATORY HE SAYS:

Yes. As noted on page 423 of our October, 1975 article in the Journal of Law and Economics, "...the removal of commercial stimuli from the environment (including advertising, brand name identification, and identification with well-known establishments) limits consumers' knowledge of current or potential alternatives and hence also limits their response to these alternatives."

### TO THE FIFTEENTH INTERROGATORY HE SAYS:

- (a) Yes.
- (b) The prices will tend to go up.
- (c) Trade names provide valuable information to consumers. If the use of trade names is limited, the options of consumers will be effectively limited. Competition will be reduced and prices will go up.

### TO THE SIXTEENTH INTERROGATORY HE SAYS:

One of the most valuable assets which individuals have in this large mobile country is their knowledge about trade names. Consumers develop a sophisticated understanding of the goods and services provided and the prices associated with different trade names. This permits them to locate the goods, services, and prices they prefer on a continuing basis with substantially lower search costs than would otherwise be the case. This can perhaps be illustrated by pointing out the information provided by such names as Sears, Neiman Marcus or Volkswagen. This also means that firms have an enormous incentive to develop and maintain the integrity of the products and services provided under their trade name: the entire package they offer is being judged continuously by consumers on the basis of the samples they purchase.

If there were no trade names, individuals would have much greater difficulty obtaining information about the range of providers. They might know the providers in a given community well, but if they moved or if some of the providers moved, the problems of acquiring new information would face them. Without trade names, the generality of the information available would be reduced.

For a product which is not frequently purchased, like eyeglasses, the restrictions on information may have particularly severe consequences.

TO THE SEVENTEENTH INTERROGATORY HE SAYS:

The answer was given to the previous question.

TO THE EIGHTEENTH INTERROGATORY HE SAYS:

- (a) Yes.
- (b) Restrictions on the use of the trade name will

mean that consumers are less well informed about their options. Prices will rise and, because of the higher prices, fewer people will obtain eyeglasses.

(c) It is quite straightforward. Prices increase when consumers are less informed and competition decreases. Commercial providers can be hurt substantially if limitations are placed on the type of information they can provide to consumers. Placing limits on the use of a trade name is one of the most effective ways of limiting the information provided.

Trade names are of course not the only form of information generated by providers, but they are an important form. It is not surprising that in those states which place limits on the use of trade names, the commercial providers have a smaller share of the market.

Our 1975 study in the Journal of Law and Economics finds that in states where less commercial information is available (and trade names are an important dimension of this) the prices tend to be higher. In that study we also found that the less well-educated consumers were more adversely affected by the restriction on information than those with more education. The prices tend to go up more for the less educated, lower income individuals when such restrictions are imposed.

All groups were also adversely affected in that they obtained eye care less frequently where there were higher prices. This is a particularly unfortunate consequence of these restrictions. Many individuals are currently not receiving adequate eye care and these restrictions further raise the financial barrier for such care.

TO THE NINETEENTH INTERROGATORY HE SAYS:

- (a) Yes.
- (b) The demand for their services will be less than it would without the restriction.
- (c) The trade name provides information about where consumers can go if they like the service. Without the trade name affiliation, such information is much more difficult for consumers to obtain.

### TO THE TWENTIETH INTERROGATORY HE SAYS:

- (a) Maybe.
- (b) There will be some increased demand for their services because of the reduced competition from the commercial firms. Their prices will tend to rise. The effects of this on the income of the individual optometrist will be dampened by the influx of optometrists from other states and the reduced sales of glasses at the higher prices.
  - (c) I have answered this in the previous question.

### TO THE TWENTY-FIRST INTERROGATORY HE SAYS:

- (a) Yes.
- (b) & (c) As stated earlier, the trade name conveys information. If the number of services covered under the trade name is reduced, then consumers can no longer depend upon the trade name to provide information regarding those services. Those who are currently using the commercial firms are obviously going to be worse off. In addition, those consumers who go to providers not operating under trade names will tend to pay higher prices. In the 1975 study in the

Journal of Law and Economics, we found that the prices charged by all providers tended to go up as information flows were more restricted.

Consequently, the adverse effects of reduced competition are not limited to the currect or future users at commercial firms.

### TO THE TWENTY-SECOND INTERROGATORY HE SAYS:

- (a) Yes.
- (b) Adversely. Their market share will be less than it would be otherwise. Their competitive position will be weakened.
- (c) The success of the commercial firms is very much a function of the information they can provide to consumers. In those states where severe limitations are placed on their ability to provide information about eye services, the commercial firms do not do well. Any firm would be hurt if the range of services provided under its trade name was limited. In this particular case, the adverse consequences are likely to be significant.

### TO THE TWENTY-THIRD INTERROGATORY HE SAYS:

- (a) Possibly.
- (b) The answer is the same here as to question 20.
- (c) The same as question 20.

### TO THE TWENTY-FOURTH INTERROGATORY HE SAYS:

- (a) Yes.
- (b) Yes.
- (c) The American Optometric Association and the state affiliates are quite explicit in their desire to

eliminate the types of information generated in the usual process of commercial exchange. Quoting from page 423 of the 1975 Journal of Law and Economics paper, "From the point of view of the profession, restricting information may be one of the most effective politically acceptable methods available for constraining the behavior of suppliers and consumers in the desired direction." In my view, these efforts to restrict information, including trade name restrictions, are a significant restraint in trade.

### TO THE TWENTY-FIFTH INTERROGATORY HE SAYS:

- (a) Yes.
- (b) In my opinion, reducing the information available to citizens of a state by placing restrictions on trade names will have the effect of adversely affecting the quality of eye care of the citizens of the state.
- (c) For several years I have looked into this question and have found no systematic evidence to suggest that, for those who receive eye care, the quality of eye care is lower in a state like Texas which has commercial advertising, which includes trade names, than in states without commercial advertising. There are, of course, specific examples of bad care provided by trade name firms, but there are also specific examples of bad care by non-trade name providers. I have seen no evidence which suggests that the quality of care, for those who receive eye care, is generally lower in Texas than in states which are more restrictive.

The reason I say that quality of care will tend to be lower when less information is provided is because less information will mean higher prices and that will mean fewer people will obtain eye care and eyeglasses. They will obtain glasses less frequently and hence their glasses will tend to be less suited to their current problems, if they have any glasses at all. This is particularly unfortunate since eyes tend to deteriorate more rapidly with age, and hence this group is particularly adversely affected by the higher prices.

The quality of care is dependent not only on the quality for those who receive care, but also upon the frequency with which they receive care. Many people are currently not receiving proper eye care according to the professional representatives. To quote from my 1975 article on page 445, "Professionals have asserted that the utilization of eye care in the United States is approximately half the optimal rate."

My assertion that fewer people will receive care is based on results from the 1975 study. Table 4 on page 439 of that study shows the prices and the frequency with which people obtain eyeglasses in the more and less restrictive areas.

### TO THE TWENTY-SIXTH INTERROGATORY HE SAYS:

- (a) Yes.
- (b) Higher prices and fewer people obtaining eye care. Our evidence suggests that the less educated, less sophisticated, lower income consumer will hurt even more than the average consumer.
- (c) The evidence from my two studies and all the other evidence I have seen.

### TO THE TWENTY-SEVENTH INTERROGATORY HE SAYS:

I grew up in Texas so I was familiar with the name Texas State Optical when I was young. I was contacted approximately two months ago about this case and agreed to testify. Both of my studies were completed prior to this contact with Texas State Optical. I have never owned any stock in Texas State Optical, have never been employed by Texas State Optical, have never accepted any compensation from Texas State Optical, nor am I accepting compensation for testifying in this case.

LEE KENNETH BENHAM

Subscribed and sworn to before me this\_\_day of\_\_\_\_\_, A.D., 1976.

Notary Public within and for the County of St. Louis, State of Missouri.

My commission expires September 15, 1979.

\* \* \*

[In the United States District Court for the Eastern District of Texas]

#### DEPOSITION OF DR. LEE BENHAM

TO THE FIRST CROSS INTERROGATORY HE SAYS:

Yes.

TO THE THIRD CROSS INTERROGATORY HE SAYS:

- a) Probably not.
- b) Requiring extensive price disclosures will have the effect of raising the cost of providing any information to the consumer and would likely have the effect of reducing the amount of information actually provided. If certain eyeglass specifications comprise a very small part of the market, the cost of advertising those items may greatly exceed any offsetting economics resulting from the advertising. This statute has all the appearance of a tax on advertising and is likely to work to the detriment of the average consumer in the state.

TO THE FOURTH CROSS INTERROGATORY HE SAYS:

- a) The state does not require price disclosure.
- b) The statute states that no one can advertise price unless they obtain a permit and advertise the prices of all items listed with equal prominance. In virtually no markets do we observe all items given equal prominance irrespective of their volume of sale. Such a requirement will make any advertising more expensive and consequently there will be less of it. On net, I would guess that most consumers would be less well informed as a consequence of this requirement than would be the case without restrictions on advertising.

TO THE FIFTH CROSS INTERROGATORY HE SAYS:

In my opinion, it is better to have one price advertised than none at all. As noted above, since the current price advertising statute is in effect a tax on advertising, there will be less advertising and most consumers will be less well informed. Since they are less informed, they will be more vulnerable to being charged higher prices.

The most obvious consequence of bait and switch is that consumers end up paying more. Therefore if bait and switch were a common consequence of advertising, consumers would on average end up paying more in states which permitted advertising. All the available evidence suggests just the opposite. The prices consumers end up paying are lower in the states with fewer restrictions on advertising. This suggests to me that the problem of bait and switch is much less important than the adverse consequences of restrictions on information.

I have seen no evidence to suggest that the problem of bait and switch arises frequently. Bait and switch tactics are, I believe, against the law. If the problem does arise, then specific, inexpensive, remedies can be developed.

TO THE SIXTH CROSS INTERROGATORY HE SAYS:

a) Probably, although I have no direct evidence.

TO THE SEVENTH CROSS INTERROGATORY HE SAYS:

- a) My guess is that it would tend to reduce the overhead.
- b) The restrictions on advertising do not eliminate the desire of the consumer for information or of the providor to make it available. If advertising is

restricted, then the providors will attempt to make their existence known in other ways. One of the most important ways is in terms of location. A convenient and visible location which will attract consumers is generally going to be more expensive. This is an alternative and expensive form of substitution for advertising. Another substitute for the more conventional forms of advertising is to provide elegant surroundings in the waiting room. From the consumers point of view, the convenience and posh surroundings are not without value but are an inefficient substitute for having more direct information. This is not to say that in states with advertising, such amenities will be absent. Certainly not. Only that these are two dimensions along which overhead costs will likely increase when advertising is restricted.

There is another dimension in which overhead costs are lower is states which permit advertising. States with advertising restrictions appear to have higher frequency of low volume, high priced outlets which have high overhead per paid or eyeglasses sold. In the more competitive states, (as Texas has traditionally been) these high overhead operations have faced more competitive pressure and hence have had a smaller share of the market. The evidence with which I am familiar suggests that the overhead costs per pair of glasses sold are substantially higher in the states with advertising restrictions.

TO THE EIGHTH CROSS INTERROGATORY HE SAYS:

a) That is stating the proposition incorrectly.

b)Advertising in newspapers or television will sometimes result in higher volume of sales. A firm doesn't generally increase its volume so that it can advertise; the advertising sometimes leads to a higher volume.

TO THE NINTH CROSS INTERROGATORY HE SAYS:

- a) I do not know.
- b) The firms which advertise could well have a higher volume per firm. The number of employees per firm is likely to be higher in the firms which advertise. I would also expect that the optometrists in the advertising firms spend less time waiting for patients.

There is no a priori reason to believe that the pressures on the employees in the advertising firms will differ from the pressures on employees of non advertising firms. The pressures to keep prices down will be less for all providers in the states with restrictions on advertising.

### TO THE TENTH CROSS INTERROGATORY HE SAYS:

- a) I see no reason why.
- b) The pressures placed on employees in eye firms, as in all firms, will depend upon many factors. There is no reason why advertising, per se, should lead to systematically different incentives. I would expect greater specialization in the advertising firms where the optometrist is less frequently involved in tasks which do not require his training.

#### TO THE 11th CROSS INTERROGATORY HE SAYS:

- a) In my opinion, the consumers will generally make a sensible choice within the limitations of the information available to them.
- b) There is every reason to believe that the quality of service varies across optometrists (just as it does in the case of physicians, dentists, or other professionals). The individual consumer has great difficulty in obtaining information about these differences including, the

"personal reputation for professional competence." One of the principal reasons is that the professional associations go to considerable lengths to ensure that an optometrist will not give a candid appraisal of another optometrist to a patient. This is shown in the Code of Ethics of the American Optometric Association, as quoted in footnote 9 on pages 424 and 425 of our article on "Regulating through the Professions." "The optometrist, in his relations with a patient under the care of another optometrist, should observe the strictest caution and reserve; should give no derogatory hints relative to the nature and care of the patient's disorder.. . . When an optometrist succeeds another optometrist in the charge of a case, he should not make comments on, or insinuations regarding the practice of the one who preceded him."

What all this means is that the consumer is on his own in making judgments about providers of service because very little information about the quality differences across practioners is provided. If consumers go to a source of care and are satisfied with the service and price, they will go back. If they are not satisfied, they won't go back.

This is true both for sources of care which advertise and for those which do not. The difference is that with advertising, some dimensions of the prospective transaction are known before the transaction is underway.

TO THE 12TH CROSS INTERROGATORY HE SAYS:

That was my impression.

TO THE 13TH CROSS INTERROGATORY HE SAYS:

I did not know it, but it does not surprise me given the nature of the statute discussed above.

TO THE 14TH CROSS INTERROGATORY HE SAYS:

One section of the study published in 1972 was concerned with this issue. This study is already in evidence.

### TO THE 15TH CROSS INTERROGATORY HE SAYS:

There is a discussion in the 1972 and 1975 studies on the question of quality. Both have been put in evidence. At the time these studies were published, I had seen no systematic evidence suggesting that the quality of eye care or eye glasses differed as between states with and without advertising for those who received eye care. I know of no new evidence which shows a systematic difference. The quality of eye care for the population as a whole will be adversely affected by the restrictions and consequent high prices since fewer people will obtain eye care.

### TO THE 16TH CROSS INTERROGATORY HE SAYS:

At the time I began the study, the 1963 NORC survey was the only data I knew about that contained information about the prices individuals paid for glasses. Had better information been available, I would have used it. When the 1970 survey described in out attached study, Regulating the Professions, became available, we used it.

### TO THE 17TH CROSS INTERROGATORY HE SAYS:

No, the consumer price index is not available on a state basis. It is noteworthy that the South and Southwest generally had a lower cost of living at the time the survey was made. A larger proportion of the restrictive states examined in the earlier study were located in the South. Hence, if anything inclusion of the

cost of living differences is likely to increase the real cost differentials as between the restrictive states and the unrestrictive states.

One way to examine this question directly is to compare the prices on contiguous states which have difference laws. Louisiana, Arkansas, Oklahoma and New Mexico have traditionally been much more restrictive on the question of providing information to the consumer than Texas. In my 1972 article in the Journal of Law and Economics, I made a personal survey and compared the prices of eyeglasses in Texas and New Mexico. This is discussed in footnote 14 on page 344 of that study. I found the prices to be 22% higher in New Mexico. For technical reasons discussed in that footnote, this will be an understatement of the differences consumers actually pay in the two states.

I have also made some comparisons of the prices consumers pay in Texas and the more restrictive surrounding states in 1970 using the data described in "Regulating through the Professions" published in the Journal of Law and Economics in October, 1975. As compared to Texas, the prices of eyeglasse in Oklahoma were 35% higher. The prices in Arkansas were 16.5% higher than in Texas, and the prices in Louisiana were 31% higher than in Texas. Unfortunately, no prices were available from New Mexico even though a substantial number of people were surveyed there. The fact that none of these sampled in New Mexico obtained glasses within the year presumably is one consequence of the higher prices in the state:

### TO THE 18TH CROSS INTERROGATORY HE SAYS:

No. The answer to the previous question does look at the price variation within the region. TO THE 19TH CROSS INTERROGATORY HE SAYS:

We did no special analysis on the price differences in the cost of examinations in North Carolina. In both studies, the primary emphasis was on the price of eyeglasses.

### TO THE 20TH CROSS INTERROGATORY HE SAYS:

a) and b) This question was not examined directly in the 1972 study. However, direct evidence is available in the 1975 study. In that study, as shown in Table 5 on page 442, the prices charged by optometrists for eyeglasses tended to be slightly higher than the prices charged by physicians in the restrictive states such as North Carolina.

#### TO THE 21ST CROSS INTERROGATORY HE SAYS: Restrictions on the ability of commercial establishments to hire an optometrist is the principal restriction which I had in mind.

### TO THE 22ND CROSS INTERROGATORY HE SAYS:

Had more non-routine items been provided by physicians and had the items been inappropriately coded up as part of the eyeglass cost and had our extensive coding procedure missed those items, then the price in North Carolina would have been affected more by their inclusion. I mentioned this as one possibility in footnote 13 of that study. More recent evidence suggests that the shift to physicians as the source of care in the more restrictive states is not the explanation for interstate price differences.

b) In the study published in 1975, we made a direct comparison of the price of eyeglasses by source of care. This is shown in Table 5 and 6 of that study. The price of all providers tends to rise as the restrictions increase.

TO THE 23RD CROSS INTERROGATORY HE SAYS:

Yes. The first national sample, which was conducted before I became interested in this topic, had a heavy oversampling of individuals living in North Carolina. The second study published in 1975 did not. In our 1975 article, only 3.6% of the eyeglass price sample came from North Carolina. The exclusion of that state from the later article would not materially affect the conclusions drawn. It is noteworthy that North Carolina remained a high price state in the later study.

TO THE 24TH CROSS INTERROGATORY HE SAYS:

Yes.

TO THE 25TH CROSS INTERROGATORY HE SAYS:

Yes. It is worth pointing out that excluding data from some other states would have increased the observed differences. I found and I find no a priori reason for excluding North Carolina. More important, all the evidence which I have seen since that article was published strongly supports the proposition that the restrictive states have higher prices.

It is also worth pointing out that while North Carolina was overrepresented in that study, most of the severely restrictive states were underrepresented. Indeed, the most illuminating comparison in that earlier study could well have been the comparison of the prices in Texas and the District of Columbia with those in North Carolina. This is perhaps the best indication of what can happen to prices when we move from the relatively laissez faire environment at that time in Texas and the District of Columbia to the highly restrictive environment of North Carolina. The average price of eyeglasses in North Carolina was approximately 100% higher than in Texas and the District of Columbia.

TO THE 26TH CROSS INTERROGATORY HE SAYS:

- a) The exclusion of New York would affect the conclusions concerning the importance of price advertising as compared to non-price advertising. The exclusion of New York would not affect the conclusions concerning the effects of advertising in general.
- b) This is discussed on pages 349 and 350 of my paper published in 1972. New York did not permit price advertising in 1963 when the survey was undertaken. There are a priori reasons for concern about the appropriate classification of New York however. The argument about the effect of advertising is not that advertising per se reduces prices, but that advertising permits consumers to obtain information more readily, permits them to shop more efficiently, increases competition and through these mechanisms reduces prices. Anything which reduces the cost to consumers of obtaining information will have the effect of increasing competition. This is relevant for New York in that a substantial proportion of the population of New York lives in New York City and a substantial proportion of the sample in this study from New York state came from New York City. The high concentration of sellers located in a relatively small area there reduces the difficulty consumers have in obtaining price information and increases the incentives for providers to lower their prices. New Yorkers thus have cheaper substitutes for price advertising than most other citizens, and this situation is reflected in lower prices. This unusual situation in New York creates some difficulties in ascertaining the consequences of restricting price advertising since the limitation on price advertising in New York would have fewer consequences than in less dense locations.

A study of eyeglass prices in New York state which preceded my own 1972 study alerted me to the

Competitive nature of the high density market in New York City. This is noted in footnote 18 on page 346 of that study. That note states that, "Another recent study of prices charged for frames and lenses by optomtrists and by retail stores in New York showed substantially lower prices in the retail stores. The study also found that prices charged by optometrists were lower in an area with a high concentration of commercial firms (New York City) than in areas with a lower concentration of commercial firms."

My uncertainties about the representative nature of the New York City experience in terms of price advertising caused me to include the caveat in footnote 28 of that article.

TO THE 27TH CROSS INTERROGATORY HE SAYS:

Yes.

. .

. . .

TO THE 28TH CROSS INTERROGATORY HE SAYS:

Yes, and those marketing professors whom I queried about the issue later indicated they had changed their opinion.

TO THE 29TH CROSS INTERROGATORY HE SAYS:

- a) Yes.
- b) The principal support for this study was provided by the University of Chicago which provides research facilities, some general support and salary support for its faculty members to undertake research of their own choosing. Part of the institutional support for the Center for Health Administration Studies which is part of the University of Chicago was provided by a grant from the Department of Health Education and Welfare to support research on the social and economic problems of

the medical sector. The Department of Health Education and Welfare provided the funding for the two national health surveys which were used in the two studies attached as well as in a wide variety of other research topics examined by other individuals.

There has been no research support provided to me by the commercial operators in this industry. I became interested in the question of interstate price differences originally when members of my family had to pay twice as much for eyeglasses in California as in Texas and obtained poorer service in California.

# TO THE 30TH CROSS INTERROGATORY HE SAYS:

- a) Difficult to say.
- b) It will not always be possible to locate the non-trade name optometrist when an emergency arises. If this particular problem is perceived to be serious, then surely some direct remedy can be made so that the patients have a name and a number to call in case of emergency.

## TO THE 31ST CROSS INTERROGATORY HE SAYS:

- a) Yes, but with an important qualification.
- b) I would guess that among people obtaining eyeglasses during a given time period, those who went to self-employed optometrists would know the specific name of the optometrist more frequently than those going to optometrist practicing under a trade name. However, the proportion of all persons in a state who obtain eyeglasses during a given time period is lower in the more restrictive states, where the associated higher prices lead them to obtain eyeglasses less frequently. I would guess that the proportion of all individuals in a state who know any source of eye care at all is lower in the more restrictive than in the less restrictive states.

TO THE 32ND CORSS INTERROGATORY HE SAYS: No.

Sworn to and subscribed before me this\_\_day of\_\_\_\_\_, 1976. My commission expires December 17, 1978.

\* \* \*

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

## BEAUMONT DIVISION

DR. N. JAY ROGERS	8	CIVIL ACTION
VS.	§	NUMBER
DR. E. RICHARD	§	B-75-277-CA
FRIEDMAN, DR. JOHN	§	(THREE JUDGE
W. DAVIS, DR. JOHN B. BOWEN, DR. HUGH A.	8	COURT)
STICKSEL, JR. AND DR.	8	
SALVADOR S. MORA	8	

## AFFIDAVIT OF STANLEY BOYSEN

My name is Stanley Boysen, I reside at 1611 Wethersfield Road, Austin, Travis County, Texas. I am the Executive Secretary of the Texas Optometric Association, and I have served in that position since 1964.

On June 8, 1967, the Board of Directors of the Texas Optometric Association adopted the "Provisional Membership Plan". This membership plan applied only to new members who were applying for membership in TOA. Such plan did not apply to the existing TOA members. A copy of that plan is attached. The plan is a recommendation of a TOA committee, and it was adopted by the Board at their June 1967 meeting.

On May 11, 1968, the Board of Directors of TOA adopted and instituted the "Practice Evaluation System". This applied to both new members and existing members of TOA. The "Practice Evaluation System" was an outgrowth and an enlargement of the 1967 "Provisional Membership Plan". The attached

article from the June 1968 TOA Journal outlined the provisions of the "Practice Evaluation System".

In the September, 1969, issue of the TOA Journal, Dr. Jerome McAllister wrote an article on the "Practice Evaluation System". He was mistaken in his dates when he stated that the "Practice Evaluation System" started on January 1,1970. This error is obvious from a reading of the 1968 TOA Journal article on the same subject.

The "Provisional Membership Plan" and the "Practice Evaluation Plan" were not drafted, adopted, or intended for the purpose of opening membership of TOA to commercial optometrists.

Neither the "Provisional Membership Plan" nor the "Practice Evaluation System" were a product or a result of the 1969 compromise legislation. They were not the result of any promises on behalf of TOA or any spokesman for TOA. To my knowledge, no member of TOA has ever promised anyone that the membership of TOA would by enlarged to encompass commercial optometry. Membership in TOA has been and continues to be limited to those who adhere to the professional standards set forth in the TOA rules of practice and the standards of the respective local optometric societies.

s/s Stanley Boysen

STATE OF TEXAS
COUNTY OF TRAVIS

Before me, the undersigned authority, a Notary Public in and for said county and state, on this day personally appeared STANI F. BOYSEN, known to me, who being duly swore cates on oath that the foregoing information is true and correct.

s/s Stanley Boysen

SWORN TO AND SUBSCRIBED BEFORE ME, this the 8th day of October, 1976.

Notary Public,
Travis County, Texas

TO: ALL OFFICERS AND DIRECTORS OF THE TEXAS OPTOMETRIC ASSOC.

## Greetings:

The Special Committee on Provisional Membership makes the following recommendations:

- 1. That the Officers and Directors of this Association be the body to stimulate and instigate interest among marginal non-members of TOA to become Provisional Members of TOA.
  - a. The Board shall prepare a special membership application blank for such non-members. (Suggested sample enclosed).
  - b. Representatives of the Board shall, in those societies areas that have approved the Provisional Membership and Practice Evaluation Plan at a regular meeting of the society and the TOA Board of Directors has been notified in writing of such approval, make personal contact by a visit with Provisional Member prospects, and after discussion, leave a Practice Evaluation form and membership application blank with him or her.

- c. The Board shall receive such Membership applications directly through the Secretary of TOA. The Secretary shall immediately notify the President and the Board Members of receipt of such application.
- d. At the instigation of the President the Board shall alone act and decide whether the applicant is sufficiently marginal in point requirements to warrant Provisional Membership status, or if applicant qualifies for direct consideration by a local society. If the applicant qualifies for Provisional Membership only, upon approval by the Board, his or her name shall be placed in a file separate from Active (or other) Memberships, so that notation can be made from time to time on his progress toward Active Membership eligibility.
- e. Notification of such action by the Board on any given applicant shall be issued to the Secretary of the local society within which the applicant resides, if a local society exists in the residence area.
- f. Accompanying such notification to the local society shall be a request that the local society co-operate in the effort by the Board to urge, assist, and aid such Provisional Member in improving his or her practice to the point that he or she may become qualified to apply for Active Membership. This shall include the inviting of the Provisional Member to attend regular local society meetings with full privileges except voting. Request should include the appointment of one (or more) of the society members to directly be responsible for visiting, observing and assisting the

Provisional Members every three months, and reporting in writing his appraisal to both the local society and the Board of Directors of TOA through the TOA President. (Three-months is an arbitrary time suggested).

- g. The Board as a whole shall be kept informed on each Provisional Member's status by the President and Secretary each three months (three months arbitrary), by written reports in the absence of Board meetings.
- h. A Practice Evaluation System (suggested form attached) shall be the guide by which a Provisional Member is judged both for qualifying as a Provisional Member and for his progress toward achieving Active Membership eligibility.
- i. Upon achieving sufficient points within a three-year (or shorter) period on the Practice Evaluation System scale to qualify for Active Member eligibility, notification of this achievement, along with a detailed report of his or her progress history, shall be sent to the local society President and Secretary, with the request that the local society contact the Provisional Member and invite him or her to apply for local, state, and national optometric society membership. Simultaneously, notification, including congratulations and praise, shall be mailed to the Provisional Member by the President to the effect that he or she has reached the point that local and state society application for Active Membership can now and should be made, if a local society exists in his or her geographical area, for processing in the normal and customary manner. Such processing shall then be the responsibility of the local society.

- Membership fees for the Provisional Member shall be set by the Board, taking into consideration the financial status of Provisional Members as a whole.
  - a. The dues for Provisional Membership shall be the same as for regular active membership in TOA, unless altered, in special hardship cases, by action of the TOA Board of Directors.
  - b. Provisional members would be eligible for the TOA Insurance Program, to receive all publications and mailings of TOA, to become a member of the TOA Credit Union and to receive all other benefits provided to Active Members including attendance at all meetings of the association with privileges of floor but cannot vote.

A period of three years as a Provisional Member shall be sufficient time to determine if a given Provisional Member is achieving toward the goal of Active Membership.

- a. Unless extenuating and excusable circumstances have interfered with said achievement, the Provisional Member shall be dropped from the rolls of TOA at the end of three years.
- b. Should such circumstances extenuate, a vote of two-thirds of the Board shall continue the Provisional Membership, if approved by the local society, for one more year.
- c. Before such a vote to extend is called for, the complete history of the Provisional Member must be reviewed.
- 4. Having instigated the solicitation of Provisional Memberships in TOA, the Board shall find it

incumbent upon itself to utilize every means at its command to carry through on each and every case on the Provisional Membership rolls toward a successful conclusion of the program.

- a. If Practice Management training is required, provide it.
- b. If post-graduate study to sharpen his or her optometric skills for greater proficiency is needed, arrangements could be made either through the University of Houston, or by means of training seminars manned by TOA members proficient in given methods and modalities.
- c. Aid in office routines shall be made available if needed.
- d. Public Relations knowledge shall also be made available.
- If, by experience in the Program, changes in procedure are found necessary to enhance the program, careful study to the proposed changes shall be made before adoption.
  - a. A Committee on Provisional Membership rules changes shall be appointed either from withn or without the Board by the President to perfect and recommend on such changes deemed advisable.
  - b. Such changes shall be concurred in by the local societies, who have approved the program as provided in Section 1(b), after presentation by the Board.
- A report shall be made annually to the TOA State Conventions assembled - in detail - numbers involved, precentage of those improving, etc. on all Provisional Members.

 All-out effort shall be made by the Board to conclude this program within a reasonable length of time.

The attitude of the local society in which the Provisional Member resides regarding that member should at all times be taken into consideration by the Board.

Immediately upon adoption of the Provisional Member program, a Practice Evaluation System will be considered for adoption by TOA to apply to existing members of TOA. Such Practice Evaluation System could quite easily be a duplicate of the so-called "Colorado Point System", with whatever variations that may apply to the unique needs of TOA.

Your committee recommends the official names of this activity be:

- 1. Provisional Membership Plan
- 2. Texas Practice Evaluation System (instead of Point System).
- 3. Special Application Form for Provisional Membership. Later,
- 4. Texas Practice Evaluation System for Members of the Texas Optometric Association, Inc.

We, your Committee on Provisional Membership, present these proposals in the hope that further consolidation of membership in the Texas Optometric Association can be achieved. We hope, too, this may institute the beginning of a new era in optometric organization and co-operation.

Respectfully submitted,

Joe Wright, O.D.

Wes Pettey, O.D., Chairman

## PRACTICE EVALUATION SYSTEM

# No. 1. OFFICE LOCATION AND EXTERIOR APPEARANCE

25 points for professional location in office building, professional center or downstairs separate street location.

5 points for street location with public presentation as dispensing optician, with displays, signs, etc.

25 Maximum

## No. 2. ADVERTISING OTHER THAN PROFES-SIONAL CARDS OR LISTING

20 for no advertising

6 for no TV and Radio adv.

3 for no Newspaper adv.

2 for no Telephone dir. adv.

2 for no adv. in other directories or periodic

Publications

20 Maximum

## No. 3 DISPLAYS

15 for no displays

5 for no window display

3 for no frames from view of people in reception

room

15 Maximum

### No.4 SIGNS

20 for professional signs only

10 for no neon signs

5 for no oversize, garish signs from front and \_\_\_sides of office

20 Maximum

# No. 5 PRACTICE IN YOUR NAME ONLY, AND NAME NOT USED IN CONJUNCTION WITH OPTICAL COMPANY, OPTICIANARY, OR DISPENSARY

10 points Maximum

# No. 6 ATTENDANCE AT PROFESSIONAL MEETINGS

4 points for 4 local society or TOA meetings annually

6 points for one TOA approved educational meeting annually

10 points Maximum

Total possible points, 100.

Sixty points shall be sufficient to qualify an applicant to become a Provisional Member; however, he is required to achieve five additional points each year for a period of three years in order to become an Active Member.

Page 8

The Journal of the Texas Optometric Association/ JUNE, 1968

# Practice Evaluation System Adopted at TOA Convention

The following Practice Evaluation System, over a year in preparation, was adopted at the recent TOA Convention in Austin.

DICDIAVO

TO: THE OFFICERS AND DIRECTORS OF THE TEXAS OPTOMETRIC ASSOCIATION, INC.

The Special Committee on Membership Eligibility in the Texas Optometric Association, Inc. makes the following recommendations:

1. An optometrist licensed to practice optometry in the State of Texas shall be eligible to become an Active Member, or shall be eligible to continue a present Active Membership already held in the Texas Optometric Association, Inc., who can qualify according to the following Practice Evaluation System requirements, as interpreted by the official TOA Membership Committee in conjunction with the agreement of the TOA Board of Directors:

## **Practice Evaluation System**

- I. OFFICE LOCATION AND EXTERIOR APPEARANCE
  - 25 points for professional location in office building, professional center, downstairs separate building or street location, or in conjunction with other professionals.
  - 5 points for street location with public presentation as dispensing optician, with displays, unprofessional signs, etc.

25 Maximum

- II. ADVERTISING (Professional Card or Listing Acceptable)
  - 20 for no unprofessional media releases
  - 6 for no TV and Radio advertising
  - 3 for no Newspaper advertising
  - 2 for no Telephone directory advertising
  - 2 for no advertising in other directories or periodic publications
  - 20 Maximum

111.	DISPLATS
	15 for no displays
	5 for no window display
	3 for no frames in view of people in
	reception room
_	15 Maximum
IV.	
1	22012
	10 for professional signs only
	5 for no neon signs
	3 for no oversize, garish signs from front
	and sides of office
**	10 Maximum
V.	PRACTICE IN YOUR NAME ONLY, AND
	NAME NOT USED IN CONJUNCTION
	WITH OR FOR OPTICAL COMPANY,
	OPTICIANRY, OR DISPENSARY
	10 Maximum
VI.	ATTENDANCE AT PROFESSIONAL
	MEETINGS
	4 points for 4 local society or TOA
	meetings annually
	6 points for one TOA approved educational
	meeting annually
_	10 Maximum
VII	MINIMUM STANDARDS FOR VISUAL
V 11.	EXAMINATION
	as promulgated by Texas State Board of
	Examiners, (1957)
	10 Maximum
	Total possible points, 100

- 2. A Minimum of 70 points shall be required in order for a member to maintain a present TOA Active Membership, or for a new applicant to qualify as an Active Member in TOA.
  - a. Should the TOA member not qualify for Active membership with a total of 70 points, he shall be allowed a maximum of 24 months

from that date to achieve the 70 points without being removed from the TOA Active Membership rolls.

b. An applicant for new Active Membership in TOA not complying with the required 70 points shall be eligible to be automatically placed on the rolls of TOA as a Provisional Member, if the applicant desires such alternate membership, and achieves the required 60 points.

c. An already Active member of TOA not complying with the required 70 points on or after January 1, 1970, shall automatically be placed on the Provisional Membership rolls, if the member desires such alternate membership.

 Local optometric societies shall use the above Practice Evaluation System in accepting an application for Active membership in a local society.

- a. The local optometric society shall first be required to approve the application for Active Membership and then shall forward, along with its recommendation, the application for Active Membership and the P.E.S. form to Membership Committee and the Board of Directors of TOA for final approval or rejection.
- 4. In the absence of a local organized optometric society in the area of residence of an applicant, the applicant shall secure a membership application form along with a Practice Evaluation System form from the Secretary of the TOA, and, after having filled out both forms return both to the Secretary of TOA for direct approval or rejection of the application for Active Membership by the Board of Directors of TOA.

- 5. Beginning January 1, 1970, each member of TOA, or each applicant for membership in TOA, shall be required, in order to qualify to continue Active Membership or to apply for Active Membership, to achieve an additional 5 points each year for three years, to total 85 points by January 1, 1973, as judged by P.E.S., and iterpreted by the Board of Directors of TOA.
- 6. It shall be required that the Board of Directors of TOA shall by July 1, 1968 submit a Practice Evaluation System form to be filled out and returned to the Directors within ninety days of receipt in order to develop a Practice Evaluation System information record of every TOA member.

Respectfully submitted: Joe Wright, O.D. Weston A. Pettey, O.D., Chairman

# [In the United States District Court for the Eastern District of Texas]

# DEPOSITION OF DR. E. RICHARD FRIEDMAN

# [10]

- Q. When did you enter the practice of optometry?
- A. 1940.
- Q. And you say that this battle has been raging since 1940?
- A. Well, of course, I was not active. I was just really in practice and then I went into the service for four years, but yes, I would say that there had been -- the makings of it were beginning back then.
- Q. Was there in fact a bill adopted in the 41st legislature that led to a further dispute within the profession?
- A. I really don't know. That was before my time, before I was active. I was in the service in those days.
- Q. Tell me what these two factions are?
- A. The two factions are those that believe in optometry being practiced in a professional manner similar to medicine and dentistry and the other great professions, and those that think that optometry should be practiced in a not so professional plane.
- Q. All right. Now, let's define for the moment the basic differences between the two. You represent a viewpoint, let's say, that is espoused by the TOA, is that correct?
- A. I don't --
- Q. You personally?

- A. I wouldn't say that, no. I represent a viewpoint that is my own viewpoint. I don't espouse anybody's viewpoint, and I don't believe in espousing anybody's viewpoint.
- Q. All right. Fine. Tell me the difference between the two viewpoints. You said that one of them is not so professional.
- A. Well, I mean, elucidate. Just what --
- Q. What do you mean by that?
- A. Well, professional practice means proper doctorpatient relationship, ample time given to the seeing of a patient, no commercial aspects, no holding yourself out to do certain things different than others. This is what I mean. This is my idea of being a true profession.
- Q. Let's just take these a step at a time. You said no commercial aspects. What do you mean by that?
- A. Oh, I would say price advertising, window displays, blatant signs, things that are pretty well mentioned in our statute, that I mentioned as being prohibited in our statute.
- Q. Window displays. That would be where frames and
- A. Frames and glasses in the doctor's windows, yes.
- Q. What about, you said large signs; that would be a commercial type sign?
- A. Neon, huge neon signs and such.
- Q. What about newspaper advertising?
- A. The same thing there, any blatant newspaper

- advertisement. I think a professional cut such as a physician or a dentist uses is proper.
- Q. What about trade names?
- A. No, I don't think a professional should use a trade name.
- What other commercial aspects do you refer to?
- A. That pretty well wraps it up, I think, outside of just the general practice. I do think that a large volume practice does not lend itself to proper doctor-patient care.
- Q. As you discuss these five commercial aspects, aren't you -- you were here during the deposition of Dr. Mora.. Doesn't it all boil down to advertising in one form or another, whether it is a trade name, price, window displays, neon sign?
- A. Well, that plus the actual patient care, yes.
- Q. All right. Now, would you agree with me that whether I am a single practioner or associated with a hundred lawyers, that I can either handle a large volume or a small volume as, one, the demand, and two, my inclination permits?
- A. No. sir.
- Q. You do not?
- A. No. sir.
- Q. Well, let's just take the lawyer as an example. I can either --
- A. I can't speak for a law practice. I can only speak for an optometric practice.

### A-373

- Q. Well, is it your opinion and are you testifying here that the single practitioner cannot handle a large volume?
- A. Not -- it depends on what you mean by a large volume.
- Q. Well, you used the term. I just accepted it.
- A. I think a single practitioner can see one --two patients every -- he can see a patient every 45 minutes and do an adequate job, yes.
- Q. Well, was that different from Dr. Mora and his practice?
- A. I don't know Dr. Mora's practice. I don't know how he practices. I assume he practices professionally.
- Q. Well, would that be any different from the man practicing in an office with Texas State Optical?
- A. I really couldn't say.
- Q. Can you tell me why there would be any difference?
- A. Only if they are seeing more patients than can be properly given care.
- Q. That would then depend largely upon the man and his professionalism, would it not?
- A. I woud say so, yes.
- Q. And it would be --
- A. I would imagine that they have the right to see as many patients as they wish. I would hope so.
- Q. All right. And so whether he was properly treating a patient would be more --

- A. But that's what you are asking me, is this professionalism, and exactly what I think. If the man is seeing the proper number of -- giving patients proper care, this is professional.
- Q. That's right, and that is one of the things that you are speaking to?
- A. Yes.
- Q. All right. Now, cutting through all of this conversation that you all have had through the years, at this point essentially there is no disagreement between you and Dr. Rogers as to the proper examination for refraction or prescription, is there?
- A. No, sir, I don't think there is any disagreement.
- Q. So whether a patient would come to your office or to Nate Roger's office, you would expect that he would get the same proper examinations or refraction and prescription?
- A. I would expect and hope that he would.
- Q. And you rather believe that's true, do you not?
- A. I think in many instances it is, yes.
- Q. But you all have had, and do have and apparently will continue to have, a substantial disagreement about, as Dr. Mora said, the mode of practice.
- A. I think there is less disagreement today than there was a few years ago before the new Texas Optometry Act.
- Q. And the mode of practice reates basically, does it not, to these five items that you mentioned: window displays, price ads, signs, newspaper ads, and trade name.

- A. I believe that most optometrists today are in compliance with the statute, which is all I am saying they need to do as far as the Board is concerned.
- Q. What about the ownership of multiple offices?
- A. There is nothing in the statute about that.
- Q. What is your viewpoints on the ownership of multiple offices?
- A. I have no viewpoint one way or the other. I just believe that the statute should be compiled with.
- Q. Do you own multiple offices?
- A. I do not.
- Q. Have you ever owned multiple offices?
- A. Never have.
- Q. Did the TOA introduce a bill in 1951 to eliminate multiple offices?
- A. I really don't know.
- Q. Is this one of the aspects of the code of ethics of the TOA that you shall not own multiple offices?
- A. I'm not sure. Could be.
- Q. We will come back to that.
- A. Okay.
- Q. Board Interpretation No. 8, the revised Board Interpretation No. 8, speaks to the use of what you might call para professionals, does it not, assistants?

- A. I don't remember. I will have to --
  - MR. GREENHILL: Here.
- A. Yes, yes, I remember this.
- Q. Now, Board Interpretation No. 8 relates to assitants or para professionals.
- A. Yes, sir.
- Q. Taking histories and making certain -- taking certain steps in the examination process?
- A. Yes.
- Q. And one of the purposes of this is to better utilize the professional's time.
- A. I would assume so, yes, sir.
- Q. Well, isn't that --
- A. It's to free him to perform duties to which he is more specially qualified.
- Q. To which only he is --
- A. Yes.
- Q. -- trained and licensed?
- A. Yes.
- Q. And this Board Interpretation No. 8 and its implementation reduces the amount of time that the professional need spend with any particular patient?
- A. Yes.
- Q. And that would allow him to see more patients and render more patient service as a professional?

- A. Yes.
- Q. The 45 minutes that you speak about in this normal examination, does that include the frame styling and fitting?
- A. No, sir.
- Q. You are speaking now just the optometrist's --
- A. Yes.
- Q. patient examination?
- A. Yes. I might mention that I personally do not use a para professional in my office. I take my own case history because I think it's extremely important, and the same with any acuities and all these things. I know that the Board has interpreted the statute to allow these things but does not mean that this is the way all optometrists need practice.
- Q. And you voted for it if the records --
- A. I was not on the Board at the time this was passed.
- Q. It was adopted unanimously and it was adopted in January of '72 and you were not a member of the Board at that time?
- A. No, sir.
- Q. All right. You have been to the M.D. whose assistant has taken your case history.
- A. Yes, sir, sure have.
- Q. Now, when you spoke of the battles that took place in the legislature and the court, when did you begin participating in these battles?

- A. Oh, I would guess somewhere in the late 1950s. I wouldn't say participating. I went down and lobbied with my own representative and state senator.
- Q. As a member of TOA?
- A. No, as my, as -- for my own self. I was a member of TOA.
- Q. And what bill did you first speak to that you recall?
- A. I really don't recall.
- Q. What was the issue?
- A. I don't know. I have been down so many times I just don't remember.
- Q. All right. When you speak of cases in court, do you speak of any particular case?
- A. Well, I am familiar with the cases that started -- I guess with the Kee-Baber case and then all from then on.
- Q. And there has been numerous of those?
- A. Yes, sir.
- Q. You spoke of the governor's office. Has there been through the years quite a tussle with the various governors over appointments to the Board?
- A. Well, I don't know that you would call it a tussle. I think that recommednations have been made to the governor from various sources.
- Q. Including the TOA?
- A. Yes, including the TOA.

- Q. And has there been substantial dispute in the confirmation process of some Board members?
- A. Yes, sir.
- Q. Have you participated in that?
- A. I have -- yes, I have. I have lobbied with my own legislators.
- Q. Have you personally lobbied against the confirmation of Dr. Rogers and Dr. Mora?
- A. Yes.
- Q. When is the last time that you lobbied against the appointment and confirmation of Dr. Rogers?
- A. It was before the new act.
- Q. You did not personally speak to Governor Smith about the reappointment of Dr. Rogers to the present Board?
- A. I did not.
- Q. Do you know who did?
- A. No, I don't.
- Q. Have you heard it said that TOA spoke to Governor Smith and said, "Appoint anybody in Texas but Nate Rogers, and we will accept him"?
- A. No, I don't know anything about that. I never heard that expression.
- Q. Did you oppose the confirmation or, first, the appointment of Dr. Mora?
- A. Before the act was passed there were several appointments -- I don't recall the names, but we all --

all of us who were opposed to it went down and lobbied against this.

- Q. Did it include Dr. Mora?
- A. Dr. Mora, Dr. Rogers, and two or three others that -
- Q. Dr. Geller?
- A. Dr. Geller.
- Q. Dr. Shropshire?
- A. Yes, I guess so. I had forgotten that he had been appointed. Yes, that's right. But after the act was passed I believe we agreed that there would be no more - that that was part of the agreement, as I recall, that we would not block the confirmation.
- Q. Now, was this lobby effort in opposition to appointment or confirmation I am speaking right now -- was this just something that you did alone or was this done by a substantial number of members of TOA?
- A. Oh. I guess 40 or 50 members of TOA.
- Q. Dealing basically with their local representatives or someone they may have known?
- A. Exclusively.
- Q. And were some of these confirmations that you opposed, were they rejected -- specifically Dr. Geller and Dr. Shropshire?
- A. I believe so.
- Q. And Dr. Mora was concerned over your objection, as it were?

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A. No, at that -- I believe we had an agreement at that time that there was no -- when he was confirmed then Dr. Rogers was confirmed, I believe there was an agreement. I am really not sure of the specific timing of that. It just slips my mind.

## [55]

- Q. Well, is there any advantage to the person enforcing the law if he is a member of TOA as opposed to -
- A. No. sir.
- Q. Are you, Richard Friedman, any more competent to enforce the law because you are a member of TOA than because you are not?
- A. No, sir, not at all.
- Q. Well, what is the rational relationship in your mind between a four-two majority in the interest of the people of Texas?
- A. There is none. I have no rational relationship. I think any man that is on that Board, if he is sworn to uphold the law and to enforce the law, that is what he is there for, no matter what he belongs to.
- Q. That is my question. What way does membership in TOA render you better able to serve than non-TOA members?
- A. Not in any manner.

- Q. So your normal fee for eye examination leading to glasses would be \$17.00?
- A. Seventeen, and of course could be more, could be less. If we find that we need to do just a screening exam or something, why, it would be less but if I have to run certain tests, other tests, then it would be more.
- Q. What tests would make it be more?
- A. Oh, we might do tangent screen, might take some visual scales, and there are many other things that we might do in the office.
- Q. If you take visual scales, what additional charge is assessed for that?
- A. Five dollars. I take blood pressure in the office at times and charge \$5.00 for that.
- Q. Are there other tests that you have an additional charge for?
- A. Not really. It depends. If the patient has been referred to me for some reason I might, for instance, do a slit lamp examination on them and I might charge just for that, depending on my time. I usually charge on a fee for services basis.
- Q. Well, that is what I was asking.
- A. Yes.
- Q. What services generated what fees is what I am saying.
- A. I had in our office, in every room in the office is posted a fee for all services and all materials.

#### A-383

- Q. Would it be acceptable to Mr. Oliver if I asked you to mail a copy of that directly to the court reporter, and we would use it, attach it to your depostion?
- A. I would be perfectly all right.

MR. KEITH: Let me give you Mrs. Looke's address directly. Is that agreeable with you, Robert?

MR. OLIVER: Sure.

- Q. If you will do that, Dr. Friedman.
- A. Okay.
- Q. Now, your contact lens, you say, is \$125.00 for the hard?
- A. I think that's it, yes.
- Q. All right. And then \$175.00 is the total price to the patient.
- A. I may be mistaken on that. We just recently went up on our fees and it seems to me that our total fee for two pair of contact lenses was \$215.00. I believe that is right. Now we, as most of us, have had to raise our fees a little bit.
- Q. Now, what about the examination for soft?
- A. Examination for soft lens is \$150.00, and the total fee is \$300.00.
- Q. What soft do you use?
- A. We use the only two that are available, Bausch and Lomb and Hydrocurve.
- Q. Do you have them available in your office?
- A. Yes, sir.

\* \* \*

## A-384

## [96]

- Q. Now, tell me about the \$17.00. That's the examination fee?
- A. Yes. If I have done a I think I told you seventeen with the glaucoma test. It's seventeen without the glaucoma test. It would be another \$40.00 if I did a glaucoma test.
- Q. I was going to ask you that.
- A. I was wrong in my earlier testimony.
- Q. That's the sphygmometry?
- A. I just I think better when I am writing.
- Q. All right. And you perform that for persons over --
- A. Thirty-five as a rule, unless I suspect some other reason to.
- Q. Now, the \$3.00 handling charge is for what?
- A. It's for handling -- I really don't know what it is. It's something that we are permitted to charge our patients, our Medicaid patients, and when we -- they cut us back so we just add it on, so that's what it is, just handling of the material and frame.

# [99]

- Q. All right. Now --
- A. Ten dollars is -- actually the ten and three, you can combine those. It's \$13.00 for services connected with the material.
- Q. Services connected with the material?

- A. Right. This has to do with the verification of the prescription when it comes back from the laboratory, the instructions to the patient on the care and handling of the lenses, the dispensing fee and whatever is taken care of in that. The \$10.00 for the lenses is the closest to the nearest dollar of the pair of single vision lenses.
- Q. Then the \$5.00.
- A. The \$5.00 is the assumed cost of the frame.
- Q. All right. Now, the first four items, that is, the \$17.00 and the \$13.00, those are common to each eye examination?
- A. Yes. If I did not prescribe, I would cut it off there. That would be it.
- Q. Would you charge \$30.00 if you did not prescribe?
- A. No.
- Q. You would charge seventeen?
- A. Seventeen.
- Q. Okay. Now, the sphygmometry, blood pressure, visual fields, positive-negative accommodation --
- A. Blood pressure -- no, not positive-negative accommodation, but blood pressure, visual fields, maybe some other things that are not included in the basic examination I would charge for. Just depending. I just charge for my services.
- Q. All right.
- A. If I have to do a complete muscle analysis, I might charge the patient for that.

Q. Now, let's take another -- let's take a bifocal.

A. Okay.

MR. KEITH: Will you read this to the court reporter and, Doctor, we will assume that I am asking the question?

DR. ROGERS: Plus one sphere upper. Plus one add, twenty-five bifocals, clear glass chemical-treated in combination metal-zyl frames.

A. All metal?

DR. ROGERS: No.

A. Talking about an AO?

DR. ROGERS: That's fine.

- A. Again, I am not sure of the cost of the frame because I just don't recall. I am just assuming that it will be about \$15.00. My fee, total fee, would be sixty-nine.
- Q. All right. Now, again we would have the seven and the ten.
- A. Well, you've got fourteen there because I am assuming that the patient is going to have sphygmometry; bifocal, he would probably be over 35.
- Q. All right. seven, ten plus four?
- A. Right.
- Q. Plus ten for services.
- A. Yes.
- Q. Plus three for handling.

#### A-387

- A. Thirteen dollars for services connected with materials, would be \$34.00, and then the lenses, approximately \$20.00; the frame, approximately fifteen, is thirty-five -- \$69.00 total fee.
- Q. Now, do you have a record of the number of persons you examine and do not prescribe for?
- A. No.
- Q. Is that a relatively small number?
- A. I'm really not sure. I'm sure there are some every week like this, but I just couldn't tell you how many.
- Q. Do you have any record of those that you refer to an MD for treatment?
- A. We do keep a record of this so that we are sure that we get a report back from the MD. If we don't get it, we will call them and get it, but that's the only reason.
- Q. Dr. Friedman, can you outline or state any disadvantages that you conceive of to there being responsible public members on the Texas Optometry Board?
- A. I would have no objection.
- Q. I understand that, but do you see any disadvantages to a public member?
- A. No.
- Q. Or members?
- A. No, I do not. I think this is the trend and I think that one of these days there will be a public member on the Optometry Board as well as all boards.

- Q. Do you see any disadvantages to persons who are merely dispensing opticians -- and I use that to distinguish, not to otherwise -- being on the Board?
- A. Well, I would have to think about that one. I really never have given it any consideration in my mind. I would rather pass that one.
- Q. Do any come to mind at this point?
- A. No, I can't think of any, but I don't want to say that I would not have any objection to that.
- Q. Has the factionalism that has pervaded the profession in Texas since 1945, let us say, is it fair to say that it has occurred in the legislature and the courts, in the governor's office, in the administrative agencies, and it has been both legal and political?
- A. I would like to say that all parties involved in this socalled factionalism have had access to their day in court, day in the legislature and so forth, and that nobody has been denied any right to go anywhere to do anything to appeal their case.
- Q. Well, my question was, has this factionalism occurred in each of these forums?
- A. There has been, I guess you could say factionalism in all of these forums, yes, which I think is perfectly proper.
- Q. And it has taken the legal form and also the socalled political form?
- A. Yes, sir, I believe that's the democratic way.
- Q. And it has been represented by a number of socalled four to two votes on the Optometry Board, has it not?

- A. I like to think that the four-two votes represent the opinion of various Board members as to the way they interpret the statute.
- Q. Has there been in your experience any four-two vote that has not followed along the lines of TOA-non-TOA?
- A. I don't -- no, I wouldn't be surprised, but I'm not sure. I haven't kept track of the various votes and who voted how.
- Q. Are you aware of any?
- A. That are not? I am not. At this moment I am not aware. I couldn't name any, no.
- Q. Can you cite any issue where there has been a fourtwo vote other than TOA-non-TOA?
- A. Oh, I can't cite any issue one way or the other but I believe that the various -- the two groups, as you put them, have split their vote in some instances in some matters in many ways, many times. I don't think that every vote is on a four and two basis or on the basis of the association that they might belong to.
- Q. There have been many unanimous votes?
- A. Beg your pardon?
- Q. There have been many unanimous votes?
- A. Many unanimous votes, many four and one votes, many abstentions, many present and not voting, and it happens in every -- in practically every Board meeting where one or two people will disagree and not necessarily because they are a member of any group. The votes are very much -- very often mixed.

# [114]

- Q. Or an optometrist might refer a patient to a dispensing optician. That referral system conflicts, does it not, with the mode of your practice or the mode of practice of that of the TOA members?
- A. I don't think so.
- Q. Do you refer patients to a dispensing optician?
- A. Only if the patient asks me to.
- Q. When you have completed your eye examination and written a prescription, what do you next state to the patient?
- A. If you are asking me if I give the patient a choice -this is what the law says we are supposed to do -- I must admit I am remiss. I do not.
- Q. What do you normally say to the patient?
- A. I just say, "Do you want me to fill your prescription?"
- Q. Or "Have a seat here and --"
- A. "If you do, I will take you up to and we will let my frame stylist show you the frames."
- Q. Do you believe that is the customary way it is handled by the optometrists who also have an opticianry within his establishment?
- A. I wouldn't say he has an opticianry. He is dispensing to his own patients in his own office.
- Q. Okay. By a man who is dispensing to his own patients.

- A. I would say that most optometrists do, but I really can't speak for them. This section of the Act, as you know, is very confusing, and I don't think the Board has ever taken any action on it, has never asked for an opinion on it that I know of. I believe -- I am not even sure whether there has been a fact situation written on it. I don't recall one.
- Q. By "fact situation" you mean to submit that --
- A. To Mr. Greenhill.
- Q. --to Mr. Greenhill for one of these --
- A. Yes, so I really can't -- as far as I am concerned, I do not understand the section too well and I -- until we have it clarified by the Board, I really don't know what to do.
- Q. Well, could you tell the patient he has two choices: he can have you do it or he can go elsewhere?
- A. Not really. I don't think very many optometrists are doing that.
- Q. What number of patients do you recall referring to a dispensing optician in the year 1975?
- A. I couldn't tell you but it was very small. Many patients will ask me for their prescription. This is becoming more and more frequent in my office. And I can't tell you how many but this is -- and I don't refer them to any particular one. Usually, they have somebody in mind. They may go to Texas State or anyplace.
- Q. Then do you tell them to come back?
- A. For an optimetrical examination, always, yes.

- Q. And do you still charge on the same basis, \$30.00?
- A. No, no. If I give them a prescription, I will charge them \$5.00 to write the prescription and to verify it when they come back to me. So it's seventeen plus five.
- Q. When do you charge the plus five, on their return?
- A. No, no. When they leave the office and I tell them that they are paying for my verification on that prescription and that I expect them to bring it back to me to be sure it is like I wanted it.
- Q. Do you agree that this Section 515-E that we are talking about treats different optometrists differently?
- A. I don't know what it does. I am not going to say that because I don't know, and I believe if we are going to -- if the Board is going to act on that section, which I assume we will have to when we get a complaint or something, we are going to have to take some action, we are going to have to ask for a clarification by attorneys unless Dr. Rogers prevails in the meantime.

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# [In the United States District Court for the Eastern District of Texas]

# DEPOSITION OF DR. N.J. ROGERS (Taken January 13, 1976)

[75]

- Q. Yes. We are limiting it to legislative pressure. We will get to --
- A. A couple of things. One, in the nineteen sixties -- I don't recall what year, but there was a bill, another bill. Let's see. It was about 1963, I believe. There was a bill in the legislature, but to be frank, I can't remember some of the provisions of it.
- Q. What did it roughly deal with?
- A. I just don't remember what -- I remember the 1951 bill, but this was -- wait a minute. I think it had to do with the licensing of dispensing opticians. I believe that's what it was because I opposed it. TOA was in favor of that bill, and I opposed it. I spoke against it. That happened in the early sixties. I know it happened after the Dallas case in 1959, and because of what took place at that hearing, I made reference to the Dallas case. Now, this was in the legislature.
- Q. What did they do, simply the TOA was for it and you were against it?
- A. Sponsoring this legislation, supporting it.
- Q. And you didn't want opticians to be licensed?
- A. I was opposed to the licensing of dispensing opticians, both the independent dispensing opticians as well as the dispensing opticians that worked --

- Q. For you?
- A. Us or others in optometric offices or in ophthalmologists offices.
- Q. You were opposed to it because it might be unduly restrictive on your people. Is that basically the reason?
- A. No, that wasn't it. I just didn't feel that there was any basic need for it from the standpoint of the protection to the public.
- Q. Now, after 1960 what happened?
- A. This one I just made reference to was in the early sixties. I don't know whether it was '63 or '5, whichever year. Then during Governor Connally's term as Governor, we had another very bad situation regarding a fight on confirmations of State Board appointments by Governor Connally; namely, Dr. Geller, G-e-l-l-e-r, and Dr. Shropshire, S-h-r-o-p-s-h-i-r-e. Those appointments were defeated, TOA was successful in preventing confirmation of these men who were not these two men were not members of TOA.
- Q. Dr. Shropshire worked for Lee Optical, didn't he?
- A. Yes.
- Q. And Dr. Geller worked for whom?
- A. He had his own offices in El Paso. Then subsequent to that there was another call it a fight against some confirmations of some other appointments to the Board by Governor Connally, and Dr. Cohen of Longview was one of those who was not confirmed at that time.

- Q. What about Dr. Mara?
- A. Dr. Mora was confirmed, and I don't recall whether it was at the same time as these others or not. There were others that were up for confirmation when Dr. Mora was up, but I can't recall which ones, whether it was Geller and Shropshire or whether it was Cohen and Mora. I just don't recall, but there was this fight.
- Q. And you were supporting these people, and Texas Optometric people were opposing their confirmation in the Texas Senate?
- A. Yes.
- Q. And they won with regard to those appointments?
- A. They defeated these confirmations except Dr. Mora's.
- Q. Dr. Mora got appointed?
- A. He was confirmed.
- Q. So you got one out of the four?
- A. Well, I don't know what you mean I got one out of the four. One of those four were confirmed.
- Q. You were supporting all four?
- A. Yes.
- Q. And three of them were defeated and one was appointed, so you got one out of four.
- A. One of the four was confirmed, that's right. Only one of the four.
- Q. And you were supporting all four of them?

- A. Yes. Now, that has to do with the legislature.
- Q. That is all that has to do with the legislature?
- A. Then, of course, the 1969 bill that was introduced.
- Q. What happened with regard to the legislative pressure against you with regard to the 1969 bill?
- A. The TOA -- I can't be sure whether they introduced the bill. Let me think. I don't know whether they went to Governor Preston Smith after they introduced the bill or before, but there was a bill introduced -- not by me or by my associates of the people that practice in the manner that we did. Governor Smith in view of the problem on the State Board appointments and the inability to get appointees confirmed, which left the State Board inoperative for several years because during the time that two of the members were appointed and were serving during the interim between sessions, they were legally entitled to serve as Board members. The membership was three non-TOA members and two TOA members, but the TOA members refused to meet with us. These appointments were made by Governor Connally. and they absolutely refused to meet because they did not have the majority of members of the Board. The Board was unable to give State Board examinations for a period of almost two years. There was always a threat that whoever might be appointed in the future could not be confirmed because of the fighting between these two groups.
- Q. What was the makeup? Who were they?
- A. Dr. Shropshire was one.
- Q. And you?

- A. And Dr. Geller and I.
- Q. You all were the three non-TOA members?
- A. Non-TOA.
- Q. Who were the others?
- A. One was Dr. Gill and Dr. Woods, Ira Woods.
- Q. And you all couldn't get anything done?
- A. The refused to meet because they did not have the majority control.

MR. KEITH: Which defeated a quorum.

# [102]

- Q. Well, would you say that if four members of the Texas Optometry Board were in the Kiwanis Club, that the Kiwanis Club would have the control over the Optometry Board?
- A. No, because the Kiwanis Club would have no economic interest in the practice of optometry; whereas, the four TOA members of that Board have a very strong and distinct economic interest, which has been established. The facts have been established down through the years. This is the difference, the fact they are members of TOA, and the law -- and they have wanted this provision in the statute that they have control of that Board, and because there is the competitive factor and the two factions in optometry, in Texas as well as other states, but we won't go into that because it is nationwide, and because there is this economic fight and has been, this economic fight between these two

factions, the TOA group and the non-TOA down through the years, this is why they started -- full control. It's an economic control.

- Q. Are you in competition as far as optometry goes with any of the present Board members?
- A. Yes.

\* \* \*

# CODE of ETHICS

and

SUPPLEMENTS

RULES of PRACTICE

American Optometric Association 7000 Chippewa Street St. Louis, Missouri 63119 The Code of Ethics of the American Optometric Association sets forth briefly certain basic duties of its members, and it reaffirms the benevolent and humane fundamental purpose of the profession of optometry: To protect and conserve and improve human vision.

### CODE of ETHICS

It Shall Be the Ideal, the Resolve, and the Duty of the Members of the American Optometric Association:

TO KEEP the visual welfare of the patient uppermost at all times;

TO PROMOTE in every possible way, in collaboration with the Association, better care of the visual needs of mankind;

TO ENHANCE continuously their educational and technical proficiency to the end that their patients shall receive the benefits of all acknowledged improvements in visual care;

TO SEE THAT no person shall lack for visual care, regardless of his financial status;

TO ADVISE the patient whenever consultation with an optometric colleague or reference for other professional care seems advisable;

TO HOLD in professional confidence all information concerning a patient and to use such data only for the benefit of the patient;

TO CONDUCT themselves as exemplary citizens;

TO MAINTAIN their offices and their practices in keeping with professional standards;

### A-401

TO PROMOTE and maintain cordial and unselfish relationships with members of their own profession and of other professions for the exchange of information to the advantage of mankind.

Adopted by the House of Delegates of the American Optometric Association, at Detroit, Michigan, June 28, 1944.

# SUPPLEMENTS

# I. BASIC RESPONSIBILITIES OF AN OPTOMETRIST

# Section A. THE WELFARE OF HUMANITY

A profession has its prime object the service it can render to humanity; reward or financial gain should be a subordinate consideration. The practice of optometry is a profession. In choosing this profession an individual assumes an obligation to conduct himself in accord with its ideals.

# Section B. SELF-IMPROVEMENT

It is the duty of every optometrist to keep himself in touch with every modern development in his profession, to enhance his knowledge and proficiency by the adoption of modern methods and scientific concepts of proven worth, and to contribute his share to the general knowledge and advancement of his profession by all means in his power. All these things he should do with that freedom of action and thought that provides first for the welfare of the public within the scope and limits of his endeavor.

# Section C. SCIENTIFIC ATTITUDE

An optometrist should approach all situations with a scientific attitude, weighing all that is new against the present fund of knowledge and his experience, and accepting only that which is truth as nearly as he can ascertain.

# Section D. PERSONAL DEPORTMENT

An optometrist should be an upright man. Consequently he must keep himself pure a character, must conform to a high standard of morals, and must be diligent and conscientious in his studies.

Section E. OPTMETRISTS AS PUBLIC CITIZENS

# Section E. OPTOMETRISTS AS PUBLIC CITIZENS

An optometrist should bear his full part in supporting the laws of the community and sustaining the institutions that advance the interests of humanity.

## **SUPPLEMENTS**

# I. BASIC RESPONSIBILITIES OF AN OPTOMETRIST

# Section A. THE WELFARE OF HUMANITY

A profession has for its prime object the service it can

# II. RELATIONS BETWEEN AN OPTOMETRIST AND HIS PATIENTS

# Section A. CONFIDENTIAL ASPECTS OF PATIENT RELATIONS

Patience and delicacy should characterize all the acts of an optometrist. The confidence concerning individual or domestic life entrusted by a patient to an optometrist and the defects of disposition or flaws of character observed in patients during attendance should be held as a trust and should never be revealed except when imperativly required by the laws of the state.

# Section B. THE PRESENCE OF A PATHOLOGICAL CONDITION SHOULD BE COMMUNICATED BY AN OPTOMETRIST TO HIS PATIENT

An optometrist should give to the patient a timely notice of manifestations of disease. He should neither exaggerate nor minimize the gravity of the patient's condition. He should assure himself that the patient or his family has such knowledge of the patient's condition as will serve the best interests of the patient.

# Section C. PATIENTS MUST NOT BE NEGLECTED

An optometrist is free to choose whom he will serve. He should respond to any request for his assistance in an emergency. Once having undertaken a case formally, an optometrist shall not abandon or neglect the patient. Frequently the immediate, prior need of the patient for the professional services of another must be recommended by the optometrist. In any event, he shall not withdraw from a case until a sufficient notice has been given the patient or his family to make it possible to secure other professional services.

# Section D. COMPENSATIONS AND FEES

The fee charged the patient is determined by the skill, knowledge, and responsibility of the optometrist. Additional factors are the time and overhead costs, and the relative value of the service given.

# Section E. THE RELATIONS OF SERVICES AND MATERIALS

Materials utilized by the optometrist are charged to the patient on the basis of their costs to the optometrist.

### Section F. GRATUITOUS SERVICE

The poverty of a patient and the humanitarian, professioanl obligations of optometrists should command the gratuitous services of an optometrist. Other individuals and endowed institutions and organizations have no claim on the optometrist for gratuitous services.

# Section G. CONTRACT PRACTICE

It is unethical for optometrists to enter into contracts which impose conditions that make it impossible to deal fairly with the public or fellow practitioners in the locality.

# Section H INTERFERENCE OF UNRELATED PRACTICES

The acts which an optometrist performs and which are outside the confines of his profession must not mislead the public as to the scope of this profession, and must not be inimical to the public welfare or to that of his fellow practitioners.

# III.RESPONSIBILITIES TO OTHER OPTOMETRISTS AND TO THE PUBLIC

# Section A. UPHOLD THE HONOR OF THE PROFESSION

The obligation assumed upon entering the profession requires the optometrist to comport himself as a gentleman, and demands that he use every honorable means to uphold the dignity and honor of his vocation, to exalt its standards and to extend its sphere of usefulness.

# Section B. OPTOMETRIC SOCIETIES

In order that the dignity and honor of the optometric profession may be upheld, its standards exalted, its sphere of usefulness extended, and the advancement of optometric science promoted, an optometrist should associate himself with optometric societies. He should contribute his time, energy, and means to the end that these societies may represent the ideals of the profession.

### Section C. ADVERTISING

The following are deemed, among others to be unethical and to constitute unprofessional conduct in accordance with the laws and regulations of each particular state.

Soliciting patients directly or indirectly, individually or collectively through the guise of groups, institutions,

or organizations.

Employing solicitors, publicity agents, entertainers, lecturers, or any mechanical or electronic, visual or auditory device for the solicitation of patronage.

Advertising professional superiority, or the performance of professional services in a superior manner.

Any advertising or conduct of a character tending to deceive or mislead the public.

Advertising one or more types of service to imply

superiority or lower fees.

Holding one's self forth to the public under the name of any corporation, company, institution, clinic, association, parlor, or any other name than the name of the optometrist.

Holding one's self forth as possessed of, or utilizing exclusive methods of practice or peculiar styles of

service.

Displaying certificates, diplomas, or similar documents unless the same have been earned by the optometist.

Guaranteeing or warranting the results of

professional services.

Advertising of any character which includes or contains any fee whatsoever, or any reference thereto, or any reference to the cost to the patient, whether related to that examination or the cost or fee for lenses, glasses, frames, mountings, or any other optometric services, article, or device necessary for the patient.

Offering free examination or other gratuitous services, bonuses, premiums, discounts, or any other

inducements.

Permitting the display of his name in any city, commercial, telephone, or other public directory; or directory in the lobby of public halls in any office or public building, using any type which is in any way different from the standard size, shape, or color of the type regularly used in such medium.

Permitting his name to be put in any public directory

under a heading other than "Optometrist."

Printing professional cards, billheads, letterheads and stationery with illustrations or printed materials other than his name, title, address, telephone number, office hours, and specialty, if any.

Displaying large, glaring or flickering signs, or any sign or other depiction containing as a part thereof the representation of an eye, eyeglasses, spectacles, or any portion of the human head.

Using large lettering or other devices or unusual

depictions upon the office doors or windows.

### Section D. PATENTS

It is unprofessional for an optometrist to exploit a patent for lenses, appliances, or instruments used in the practice of optometry in such a way as to deprive the public of its benefits, either through refusal to grant licenses to competent manufacturers who can assure adequate production and unimpeachable quality, or through exorbitant demands in the form of royalty; or for similar forms of monopolistic control in which the interests of the public are exploited.

### Section E. REBATES

It is unprofessional and unethical to accept rebates on prescriptions, lenses, or optical appliances used in the practice of optometry.

# Section F. SAFEGUARDING THE PROFESSION

An optometrist should expose without fear or favor, before the proper optometric tribunals, corrupt or dishones conduct of members of the profession. All questions affecting the professional reputation or standing of a member or members of the optometric profession should be considered only before proper optometric tribuanls in executive sessions, or by special or duly appointed committees on ethical relations. Every optometrist should aid in safeguarding the profession against the admission to its ranks of those who are unfit or unqualified because deficient either in moral character or education.

# Section G. PROFESSIONAL SERVICES OF OPTOMETRISTS TO EACH OTHER

An optometrist should always cheerfully and gratuitously respond with his professional services to the call of any optometrist practicing in his vicinity, or of the immediate family dependents of optometrists.

## Section H. CONSULTATIONS OF OPTOME-TRIST SHOULD BE ENCOURAGED

In doubtful or difficult conditions where the services of another may be required, the optometrist should request consultations.

# Section I. CONSULTANT AND ATTENDANT

When an optometrist has been called on a case as a consultant, it is his responsibility to insure that the patient be returned to the original optometrists for any subsequent care that the patient requires.

# Section J. CRITICISM TO BE AVOIDED IN CONSULTATION

The optometrists, inhis relations with a patient under the care of another optometrist, should observe the strictest caution and reserve; should give no derogatory hints relative to the nature and care of the patient's disorder; nor should the course of conduct of the optometrist directly or indirectly tend to diminish the trust reposed in the attending opotmetrist. In embarrassing situations or wherever there may seem to be a possibility of misunderstanding with a colleague, the optometrist should always seek a personal interview with his fellow.

# Section K. GENERAL PRACTITIONER RESPONSIBLE

When the general practitioner of optometry refers a patient to another optometrist, the former remains in charge of the case and is responsible for the care of the patient until properly dismissed.

## Section L. SERVICES TO PATIENT OF ANOTHER OPTOMETRIST

An optometrist should never take charge of, or prescribe for, a patient who is under the care of another optometrist, except in an emergency, until after the other optometrist has relinquished the case or has been properly dismissed.

# Section M. CRITICISM OF A COLLEAGUE TO BE AVOIDED

When an optometrist succeeds another optometrist in the charge of a case, he should not make comments on, or insinuations regarding the practice of the one who preceded him. Such comments or insinuations tend to lower the esteem of the patient for the optometric profession and so react against the critic.

### Section N. A COLLEAGUE'S PATIENT

When an optometrist is requested by a colleague to care for a patient during his temporary absence; or when, because of an emergency, he is asked to see a patient of a colleague, the optometrist should treat the patient in the same manner and with the same delicacy as he would have one of his own patients cared for under similar circumstances. The patient should be returned to the care of the attending optometrist as soon as possible.

# Section O. ARBITRATION OF DIFFERENCES BETWEEN OPTOMETRISTS

Should there arise between optometrists a difference of opinion which cannot be properly adjusted, the dispute should be referred for arbitration to an appropriate committee of impartial optometrists.

### Section P. FEE SPLITTING

When a patient is referred by one optometrist to another for consultation or for care, whether the optometrist in charge accompanies the patient or not, it is unethical to give or receive a commission or secret division of fees, by whatever term it may be called or under any guise or pretext whatsoever.

# Section Q. OFFICIAL POSITION

A member holding an official position in any optometric organization shall avoid any semblance of using this position for self-aggrandizement.

# IV. RELATIONS BETWEEN AN OPTOMETRIST AND OTHER PROFESSIONALS

## Section A. INTERPROFESSIONAL RELA-TIONS

Dignity, propriety and a proper regard for their individual fields of service must characterize the relationship between optometrists and members of other professions.

## Section B REFERRING PATIENTS

Whenever, to complement the services of an optometrist, the patient's condition requires the professional services of another, every cooperative

effort shall be made to the end that the patient's welfare be safeguarded.

## Section C. PUBLIC HEALTH

Professional responsibility demands that the optometrist actively participate in public health measures to the end that every step be taken to safeguard the welfare of society.

Adopted 1946, revised 1968, 1970.

## AOA RULES OF PRACTICE

- A. MEMBERS SHALL abide by the Constitution and By-Laws, Code of Ethics and its Supplements, and Rules of Practice of their national, state, and local optometric organizations.
- B. MEMBERS SHALL practice in such location and manner as is customary with other health care professionals in the area.
- C. MEMBERS SHALL maintain their offices so that the physical appearance is similar to that customary with other health care professionals in the area:

Signs shall be unpretentious, limited to four inch letters at street level, seven inches above. Ophthalmic materials and certificates shall be visible only from within.

D. MEMBERS SHALL present themselves to the public in a manner similar to that customary with other health professionals in the area:

Telephone and other directory listings shall be in ordinary type size. Announcements shall be limited in size to two columns by two inches, and limited in context to name, profession, address, telephone number, office hours, and practice limited to....

Passed unanimously by the A.O.A. House of Delegates, June 29, 1968.

Enforcement of the provisions of the Rules of Practice shall be the duty of the various state associations. It is recommended that when a member is doubtful of the ethics or advisability of any action he contemplates, he shall submit a detailed statement to the proper committee of his state association for its consideration.

# Optometry's Premise

A PROGRAM of long range planning must necessarily be based upon a set of goals that he profession may justly expect to reach within the foreseeable future. Such professional goals are anticipated in some degree by the present stage of development in the profession, by a consideration of what the immediate future will probably bring forth, and by a knowledge of presently existing educational programs and scientific clinical developments.

IN ITS PROGRAM, optometry must fill the needs of a highly technical age in which the visual requirements of all peoples are becoming increasingly important and significant. In this, optometry can serve through its own research, but even more through the clinical contributions of optometrists in practice.

OPTOMETRY PERFORMS a unique and distinct vision care service. Competence in optometry is gained by formal education as well as by example, precept, demonstration and extensive clinical experience under competent teachers at institutions of higher learning and by continuous programs of postgraduate education.

THE PROFESSION of optometry, with a thorough education in physiological, psychological, mechanical, physical and geometrical optics, in addition to a broad

foundation in other sciences such as physiology, anatomy and pathology, provides its practitioners with a complete and thoroughly rounded preparation for the vision care of mankind.

THIS FUNDAMENTAL TRAINING, with emphasis on the psycho-physiology of vision, underlies modern optometry's concept and practice of functional vision care. In addition to good acuity, optometry is dedicated to the practice of preventive optometry, as well as to the comford and efficiency of the patient's vision.

THE TREATMENT of pathological conditions and eye surgery is acknowledged by optometry to be in the field of medicine. However, for the protection of the public, and in order to make proper referrals to other practitioners and specialists, optometrists must continue to be well trained in the detection and recognition of ocular signs of pathology.

OPTOMETRY, specializing in vision care, will maintain itself as a completely separate and independent profession in the general field of health care. It will continue to work in close cooperation and professional collaboration with the other health care professions, as well as with education, psychology, sociology and other related disciplines.

THE PATIENT'S BEST INTERESTS must remain paramount at all times. To that end optometry will extend its research and development in the general field of vision in order that the patient and public will be best served.

-Adopted by the House of Delegates of the American Optometric Association, at Dallas, Texas, July 1, 1959.

### DX-26

## Article XIV Code of Practice

Section 1. The following rules shall serve as a guide for the professional conduct of the members of this Association, and any violation of these rules shall be considered unethical practice.

- 1. No member shall willfully violate the Texas Optometry law or the rulings of the Texas Optometry Board.
- 2. No member shall practice in or on premises where any materials other than those necessary to render his professional services are dispensed to the public.
- 3. No member shall use the Doctor title other than as specified in the Texas Healing Arts Identification Act.
- 4. No member actively engaged in the practice of optometry shall in any manner publicize or hold himself forth as an optician.
- 5. No member shall display his license, diplomas, or certificates in such manner as to be seen and read from outside his office.
- 6. No member shall hold himself forth in such a way as to carry the slightest intimation of having superior qualifications or being superior to other members of this Association.
- 7. No member holding an official position in any optometric organization shall use such position for self-aggrandizement.
- 8. No member shall display any sign containing other than his or her name, profession, and office hours; same

to be used only on office windows or at entrance to his office. Letters must not be luminous or illuminated and must not be more than 4" in height for street level and 7" in height for offices above the street level.

- 9. No member shall display eyeglass signs or painted or decalcomania eyes anywhere.
- 10. No member shall use other than his professional card on or in any publication or in any public display. Said card shall not contain any more than his or her name, profession, address, telephone number, office hours, "eye examination by appointment" or "practice limited to \_\_\_\_\_\_" (any optometric specialties). Special announcements such as office openings, absences, or removals may be used when timely. Educational material may be published only when it has been specifically approved by the board of directors of this Associaiton.
- 11. No member shall use bold-face type or in any other manner attempt to attract special attention to himself in any telephone or other public directory.
- 12. No member shall display any merchandise, ophthalmic material or advertising of any kind in windows or in any room of his office for the purpose of inducing patronage.
- 13. No member shall do anyting inconsistent with professional standards of the optometric and allied health professions.
- 14. All members shall conform to the code of ethics and rules of practice of the American Optometric Association.
- 15. No member of this Association shall own, lease or operate optometric practices in more than three separate locations.

16. No member shall, in the judgment of the member's local society, have a direct or indirect arrangement with any optician so as to have the practical effect of solicitation by the optician for the member, the practical effect of advertising by the optician for the member, or the practical effect of control by the optician over the member.

The member shall furnish any information or documentary evidence requested by the local society for purposes of making such determination. Failure to furnish such information shall constitute an automatic forfeiture of the member's goods standing in the local society.

17. This code of practice shall become effective immediately after adoption and board of directors of this Association shall be empowered to grant extension of time in cases of hardship which are presented for its consideration.

#### A-417

# [In the United States District Court for the Eastern District of Texas]

## DEPOSITION OF DR. N. JAY ROGERS (Taken April 6, 1976)

## [118]

- Q. All right. When you took the oath of office did you take what we call the so-called Constitutional Oath of Office that is described in Article 16, Section II? I will just hand it to you and ask you to read it and tell me whether or not you took such an oath?
- A. Yes, I did.
- Q. To the best of your capacity have you attempted to uphold and execute faithfully that oath of office?
- A. Yes, I have.
- Q. Within the practice of optometry, the evidence in this case shows there are two factions. Is that a correct analysis?
- A. I would say that that is one way to express it, two factions.
- Q. What do those factions represent or what do they divide with respect to?
- A. Well, the factions are separated by what we would term the mode of practice, mode of practice of optometry.
- Q. Is patient care involved?
- A. No.
- Q. The proper diagnosis or the proper prescription?

- A. No. sir.
- Q. Is it purely economic in its manisfestation?
- A. I would say yes.
- Q. That is the factionalism?
- A. Yes.
- Q. What are the two factions that dominate the practice within the state of Texas?
- A. Well, the one group, the so-called for simplicity of reference, the so-called professional group is the Texas Optometric Association known as TOA, and the other group, which are not affiliated with the Texas Optometric Association, or generally referred to as the commercial practioner.
- Q. Is this concept of professional and commercial optometry limited purely to the state of Texas?
- A. No, it is nationwide, more or less.
- Q. In your experience as a member of this profession for nigh on to forty years, what is the national association that is the counterpart of the Texas Optometric Association?
- A. The American Optometric Association.
- Q. Does it have, in your experience, affiliated state associations?
- A. Yes.
- Q. Nationwide?
- A. Yes, in each of the fifty states.
- Q. What is the TOA?

- A. TOA is a professional association, and it is composed of members that adhere to the rules and the rules of practice of the association, of the TOA.
- Q. In your experience in having dealt with this matter over the last forty years, what in your experience does TOA stand for?
- A. Well, it stands for a certain type of outward appearance in the practice of optometry, and that is, they wish to appear on a more so-called professional appearance similar to the dentists, the lawyers, the medical doctors, and they simply want to hold themselves out in what would appear to be a more professional type, less commercial type of practice by the general physical appearance of their offices.
- Q. Does this appearance, professionalism, result in any different quality of service to the consuming public?
- A. No.
- Q. Does it result in any -- that is the appearance of professionalism, does it result in any fee structure?
- A. Yes.
- Q. To the public?
- A. Yes.
- Q. What is the difference in the fee structure between the commercial and the so-called professional or. TOA associated optometrists?
- A. The basic difference is that the so-called professional optometrists, the members of the TOA, have a fee system or fee structure where they break down their services and their service fees such as examination fees, technical fees, reevaluation fees,

and there are several others to where the fee to the patient, to the public for the examination and the allied services that are part of the prices of optometry are much higher than the fees for that same service that the commercial optometrists charge. For example, the examination fee of the professional optometrist ranges anywhere from fifteen or eighteen dollars even up to as high as thirty-five or more for the examination aspect of it. So the professional optometrists derive a great portion of their net profit or their profit from the patient in the form or guides of professional fees.

- Q. How would that fifteen to thirty-five dollars compare to the customary fee for an examination performed by a commercial optometrist?
- It's much higher than the average commercial optometrist.
- Q. What fees for examination are charged by the Texas State Optical at this time?
- A. Well, generally ten dollars for the examination, and in some instances they are twelve dollars, and in one or two they might be a little higher, depending on the office.
- Q. You said in some instances there is one charge in Texas State Optical, and in other instances a different charge. Why is that?
- A. Well, the offices that are owned by other optometrists, Texas State Optical offices, also known as associated offices, those men establish their own fee structure, their own examination fees, their own fees for glasses and contact lenses and other services.

- Q. You do not establish the price at retail which these other men will charge?
- A. No.
- Q. So they vary from place to place and town to town and optometrist to optometrist?
- A. Yes.
- Q. But even with this individual variance that exists among TSO practitioners, are they more or less higher or lower or the same as the professionals in their community?
- A. They are generally quite a bit lower.
- Q. There is proof in this record, particularly, let us say, from Dr. Bowen and Dr. Sticksel with respect to the charges they assess the consuming public for soft contact lens. Do you at Texas State Optical dispense soft contact lens?
- A. Yes.
- Q. How many manufacturers or distributors of soft contacts are there?
- A. There are only two that we can use to supply lenses to the public. They have to be approved by the Food and Drug Administration in Washington.
- Q. What are the two?
- A. Bausch & Lomb and Hydrocurve.
- Q. Has the United States Food and Drug Administration approved both of the contact lens which you dispense?
- A. Yes.

- Q. Does any particular laboratory or any particular optometrist have anything to do with making up these lens, the soft contacts?
- A. I am not sure I understand your question.
- Q. How do you go about acquiring the soft contact lens?
- A. We simply order them. The office orders them directly from the supplier, from either one of these two suppliers.
- Q. Let us say it's a Bausch & Lomb lens that you are using and you decide a certain prescription is necessary. The optometrist merely orders the lens from the supplier?
- A. That's right.
- Q. There is no laboratory grinding or fabricating at all?
- A. On the part of whom?
- Q. On the part of anyone after the lens is ordered?
- A. No.
- Q. Whether you are a commercial or a professional optometrist, do you have the same two sources?
- A. Yes.
- Q. What is your charge for soft contact lens at this time in the state of Texas?
- A. \$225 or \$230. I am not sure.
- Q. Does that include the original examination?
- A. It includes the original examination and any followup examinations for a period of, I believe, a year.

- Q. Does that include all the materials and supplies that are dispensed with the soft contacts?
- A. Yes. That is a kit that has to be dispensed with the soft contact lenses. It's a kit for boiling, for the purpose of sterilization of the lens.
- Q. You stated earlier, but I would like to place it in capsule form. Did you personally apply for membership in the so-called TOA?
- A. Yes.
- Q. Were you approved?
- A. No.
- Q. Are you presently eligible in accordance with their Rules of Practice?
- A. No.
- Q. For what reason?
- A. Because of the method, my mode of practice. I don't meet the requirements of the Rules of Practice of TOA.
- Q. With respect to advertising, trade name and multiple offices?
- A. And window displays, signs.
- Q. In addition to optometrists, are there other licensed professionals who practice optometry?
- A. Yes.
- Q. Who?
- A. There are M.D.'s, medical doctors, and D.O.'s, doctors of osteopathy, osteopathic physicians.

- Q. Do they practice optometry as that term is defined by the Act?
- A. Yes.
- Q. Do they compete with you for patient care and ultimately for the patient's dollar?
- A. Yes.
- Q. Are they a viable competitive source within the eye care market within the state of Texas?
- A. Yes.
- Q. Have they been over the past five years?
- A. Yes.
- Q. Is there any reason to believe that this competitive force of the medical doctor will abate in the forthcoming years?
- A. No. On the contrary, I would say.
- Q. We have compared your fees to those of TOA members. How do your fees at TSO compare with those of the medical doctors?
- A. The examination fees of the average medical doctor is anywhere from fifteen to twenty-five dollars, somewhere in that range.
- Q. Again compared to what standard at TSO?
- A. About ten dollars.
- Q. Mr. Arnett from the Attorney General's office and Mr. Oliver prior to him touched on several matters leading to the adoption of the so-called 1969 Optometry Act. Have you personally participated

in and witnessed disputes within the optometric profession that have surfaced in the legislature through the years?

- A. Yes.
- Q. Have these disputes been represented again by the factionalism that you have discussed?
- A. Yes.
- Q. Does that factionalism sooner or later become an economic issue?
- A. Yes.
- Q. How and in what way does it become related to economics?
- A. Well, because the big dispute between the two factions, which is strictly the question of mode of practice, has to do with competition in the market, competition in the field of opticianry and optometry and the efforts over the years by the TOA, the efforts have been to prohibit certain practices in the practice of optometry for the purpose of either eliminating or reducing the competition for the patients. So it ultimately boils down to one of economics between the two groups, one group trying to stifle the operations or limit the operations—that is, the TOA group trying to limit the operations of the non-TOA or the corporation group.
- Q. You have recited this in detail, and I am not going to rehash it, but what is the net effect to the patient or the consuming public from these efforts of TOA?
- A. Well, the net effect primarily is increased costs to the public. That's the primary effect.

- Q. How does the public end up having to sustain an increasing cost?
- A. How did they --
- Q. How does that come about?
- A. By virtue of all these changes and restrictions placed upon the type of practice, the so-called commercial type of practice. It increases the cost of operating, and this cost is passed on to the public, to the patients.
- Q. How does it innure to the benefit of the TOA members?
- A. Well, as the competition is lessened or reduced, and as a result of that, lesser numbers will seek the services of the commercial optometrists, the result of that is some of those members of the public who might normally or would normally seek the services of the commercial optometrists and who do not as a result of the restrictions placed upon the commercial optometrists both in the form of their inability to obtain information as a result of restricted practices in advertising as well as increased costs that the commerical optometrists are faced with and have to pass on to the public. Some of the public will then be seeking the services of the non-commercial or the so-called professional optometrists, and it is a means of driving more and more people away from the commercial practitioner to the non-commercial practitioner.

\* \* \*

#### NOTATION

The Memorandum Opinion and Final Judgment of the Court below have been reproduced in the Appendix to the Jurisdictional Statement filed in 77-1163 at A-1 through A-17.

Supreme Court, U. S. FILED

MICHAEL RODAK, JR., CLERK

## Supreme Court of the United States

OCTOBER TERM, 1977

NOS. 35-1164 & 77-1186

DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN, O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W. DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their official capacity as members of THE TEXAS OPTOMETRY BOARD; and THE TEXAS OPTOMETRIC ASSOCIATION, INC., Appellants

DR. N. JAY ROGERS, O. D. and W. J. DICKINSON, Individually and as President of the TEXAS SENIOR CITIZENS ASSOCIATION, PORT ARTHUR, TEXAS CHAPTER,

Appellees

On Appeal from the United States District Court for the Eastern District of Texas (Three-Judge)

#### MOTION TO AFFIRM

Of Counsel:

MEHAFFY, WEBER, KEITH
& GONSOULIN
Beaumont, Texas
DAVIS & DELEON
Austin, Texas
VICTOR J. ROGERS, II
Houston, Texas
Counsel of Record:
ROBERT Q. KEITH
MEHAFFY, WEBER, KEITH
& GONSOULIN
1400 San Jacinto Building
Beaumont, Texas 77701

ROBERT Q. KEITH BRIAN R. DAVIS VICTOR J. ROGERS, II ARTHUR R. ALMQUIST Attorneys for Appellees

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# Supreme Court of the Haited States OCTOBER TERM, 1977

NOS. 77-1164 & 77-1186

DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN, O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W. DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their official capacity as members of THE TEXAS OPTOMETRY BOARD; and THE TEXAS OPTOMETRIC ASSOCIATION, INC.,

Appellants

v.

DR. N. JAY ROGERS, O. D. and W. J. DICKINSON, Individually and as President of the TEXAS SENIOR CITIZENS ASSOCIATION, PORT ARTHUR, TEXAS CHAPTER,

Appellees

On Appeal from the United States District Court for the Eastern District of Texas (Three-Judge)

#### MOTION TO AFFIRM

By unanimous Final Judgment and Memorandum Opinion a properly-convened Three-Judge United States District Court for the Eastern District of Texas declared unconstitutional and enjoined the enforcement of provisions of the Texas Optometry Act<sup>1</sup> that broadly forbid Texas optometrists to practice their profession under, or use in connection with their practices, any trade name, corporate name, assumed name or any other name except the name under which the individual optometrist holds

<sup>1.</sup> Revised Civil Statutes of Texas, Article 4552 et seq.

his or her license. On the basis of a massive evidentiary record and careful attention to legal authorities, the District Court grounded its decision on the First Amendment of the United States Constitution. The District Court's findings are overwhelmingly, if not conclusively, supported by the competent, credible evidence of record. The District Court's legal determinations follow naturally, firmly and directly from controlling decisions of this Court. Therefore, the District Court's holding is a sound and correct one.

The defendants below<sup>2</sup> (hereinafter referred to collectively as "Appellants") have filed Jurisdictional Statements in this Court complaining on direct appeal of the District Court's rulings with respect to the issues of trade name communication in the profession of optometry. The District Court correctly adjudicated these issues in paragraph 2 of its Final Judgment, which is now in contention, in the following manner:

Section 5.13(d) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas, is declared unconstitutional under the First Amendment of the United States Constitution insofar as it provides that "[n]o optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name or any name

other than the name under which he is licensed to practice optometry in Texas." Members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same, or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name.<sup>3</sup>

The plaintiffs below<sup>4</sup> (referred to herein collectively as "Appellees") respectfully submit that it is manifest that the complaints now sought to be advanced by Appellants are so meritless and unsubstantial as to wararnt no further argument. Accordingly, pursuant to Section 1(c), Rule 16, of the Revised Rules of this Court, Appellees respectfully move for summary affirmance of the portion of the District Court's Judgment complained of by Appellants.<sup>5</sup> In the alternative, Appellees urge the Court to take no action herein without first setting this cause for plenary consideration, at which time the Appellants should be required to show cause—if any there be—for any disturbance of the Judgment of the District Court as it pertains to the indisputably valuable commercial information publicized by a trade name.<sup>6</sup>

<sup>2.</sup> There were two groups of defendants in the District Court. The first group consists of the current members of the Texas Optometry Board with the exception of Plaintiff-Appellee Dr. N. J. Rogers. This group has been represented throughout by the Attorney General of Texas.

The second group of defendants consists of a private trade association, the Texas Optometric Association, Inc., which is represented by private counsel. The Texas Optometric Association, Inc. (TOA) supports the position of the Attorney General of Texas herein.

<sup>3.</sup> Final Judgment signed on October 27, 1977.

<sup>4.</sup> The Plaintiffs-Appellees are Dr. N. Jay Rogers, himself a member of the Texas Optometry Board for over twenty years, and Mr. W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter. All Appellees are represented by the same team of counsel.

<sup>5.</sup> Not to be confused with the portion of the District Court's Judgment now in contention is the separate portion, found at paragraph 4 of the Final Judgment, which upheld Section 2.02 of the Texas Optometry Act against the Plaintiffs' equal protection, due process and First Amendment challenges. That portion is the subject of a separate direct appeal brought before this Court by the same parties who are the Appellees herein.

<sup>6.</sup> In the event the Court determines the appeal relating to trade,

#### OPINION BELOW

The Memorandum Opinion of the Three-Judge District Court is reported under the style Rogers v. Friedman at 438 F. Supp. 428 (Sept. 12, 1977). The Judgment below is unreported. Both the opinion and Judgment are reproduced as appendices to the Jurisdictional Statement filed herein by the Attorney General of Texas on behalf of Appellants Friedman, et al.

#### **JURISDICTION**

Appellees are satisfied with the correctness of the statement as to this Court's jurisdiction found at pages 2-3 of the Jurisdictional Statement of Appellants Friedman, et al.

#### STATUTES INVOLVED

The portion of Section 5.13(d) of the Texas Optometry Act that the District Court held unconstitutional reads as follows:

No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas;

\* \* \*

Other sections of the Texas Optometry Act of which this Court should be aware include the following, in pertinent part:

corporate and assumed names to be appropriate for full briefing and argument, Appellees further urge the Court to consolidate therewith the appeal described in note 5, supra, concerning Section 2.02 of the Texas Optometry Act.

#### Section 5.13(j)

The willful or repeated failure or refusal of an optometrist to comply with any of the provisions of this section shall be considered by the board to constitute prima facie evidence that such optometrist is guilty of violation of this Act, and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license.

#### Section 4.04(a)

The board may, in its discretion, refuse to issue a license to any applicant and may cancel, revoke or suspend the operation of any license if it finds that:

(10) the applicant or licensee has willfully or repeatedly violated any of the provisions of this Act;

In addition to the foregoing statutes, other provisions of the Act that properly affect the disposition of this cause are reproduced for the Court's convenience at Appendix A hereto.

#### QUESTIONS PRESENTED

In the interest of this Court's time and convenience, Appellees will address the issues in essentially the same terms and in the same order as they are proposed at pages 3-4 of the Jurisdictional Statement of Appellants Friedman, et al. Appellees do not agree, however, that the questions submitted by Appellants accurately or ade-

quately portray the posture of this case, and, accordingly, relevant subquestions omitted by Appellants, will be noted as they arise in the argument under each broad question.

#### STATEMENT OF THE CASE

Appellees are unsatisfied with the completeness of the statement found at pages 4-5 of the Jurisdictional Statement filed by Appellants Friedman, et al., and, with a proper regard for the evidence of record, the District Court's findings therefrom and the applicable constitutional law, submit the following Statement in opposition thereto.

This suit was originally filed in August 1975. The parties and other interested persons were then allowed more than a year to obtain and present evidence, to set hearings, to intervene, to file motions and to present legal arguments. Prior to the closing of the record, the Appellants were afforded unlimited opportunity to submit every conceivable justification within their vast resources for the Texas statutory prohibition against the use of trade names in connection with the practice of optometry. Yet, instead of adducing relevant, contemporary evidence on the subject, the Appellants elected largely, if not entirely, to rely on presently-unsubstantiated, time-worn hyperbole from the majority opinion of the Texas Supreme Court in Texas State Board of Examiners in Optometry v. Carp., 412 S.W.2d 307 (1967), a case which was litigated some ten years previously and in which no First Amendment issues were decided, raised or even intimated.

Following the closing of the evidentiary record in September 1976, the Three-Judge District Court below gave careful consideration to all aspects of this case for over a year. Eventually, the District Court concluded that the portion of Section 5.13(d) of the Texas Optometry Act which effects a sweeping, blanket prohibition against the optometrist's use of any trade, corporate or assumed name in connection with his or her optometry practice violates the optometrist's First Amendment right to disseminate and the consuming public's First Amendment right to receive several types of meaningful, identifiable, valuable commercial information that inheres in a trade symbol in our free enterprise society—a society in which innumerable private economic decisions play a vital role.

Before this Court the Appellants continue to press the same tired theories, lifted from the Carp decision, that the District Court found lacking in evidentiary support and legal merit on the present record, under present-day constitutional law. Likewise, the Appellants continue to ignore the compelling showing made by the evidence with respect to the very real communicative values of trade symbolism—in particular the Texas State Optical (TSO) trade name which Appellee Dr. Rogers and other optometrists have used with dignity for over thirty-five years throughout Texas.

Of utmost significance to this Court is the reality that Appellants have utterly failed to mount a proper challenge to the fundamental basis of the District Court's ruling. The District Court plainly stated: "Based on the evidence and the briefs before this Court, the Court finds defendants' contentions unpersuasive." 438 F. Supp. at 430 (emphasis added). This Court will especially observe

Which Statement is concurred in by Appellant TOA at pages
 of TOA's Jurisdictional Statement.

that nowhere have Appellants attacked the District Court's factual determinations as "Clearly erroneous" within the meaning of Rule 52(a), Federal Rules of Civil Procedure. Appellants, then, must necessarily fail in their belated efforts—thinly disguised as objections to the trial court's legal analysis—to reargue and relitigate the controlling facts of this case in this Court. See, particularly, Jurisdictional Statement of Appellants Friedman, et al. at pages 12-14; Jurisdictional Statement of Appellant TOA at 10-11, 13-17.

The facts of this dispute, which are incontestibly established by the probative evidence and, in any event, are not now in issue for want of a proper challenge, are actually quite straightforward and, indeed, rather predictable, considering the subject matter. The District Court found that the communicative value of a trade name grows by its continued use. "[P]eople identify the name with a certain quality of service and goods, the end result being that eventually the name itself calls public attention to the product." 438 F. Supp. at 431. The District Court found that a trade name is an integral component of advertising. It also found that a particular trade name, TSO, has come to communicate to the public a composite

of valuable consumer information about the sponsor's prices, the quality of its services and materials and the manner in which particular routine visual goods and services are available. Id. Of equal significance, the District Court, on the basis of the evidence before it, explicitly rejected Appellants' contentions "that the TSO name misleads the public as to who is the responsible optometrist." Id. at n. 3.

In the light of these thoroughly valid and binding factual determinations the District Court's invocation of the "rationale of the advertising cases" met every principled test of logic, precedent and constitutional adjudication-including the doctrine that federal courts must show proper regard for legitimate state functions. Contrary to Appellants' suggested parade of horrible consequences for the public health and welfare, the District Court announced no novel or bizarre First Amendment result by its narrow holding that the State of Texas may not, through the blanket suppression of the use of a trade name in connection with the practice of optometry, effectively deny the consuming public all or most of the valuable commercial information so readily and efficiently conveyed by a trade name—a medium that virtually every man, woman and child in this country relies upon daily and, indeed, takes for granted.10

<sup>8.</sup> Rule 52(a) provides, of course, that if a memorandum opinion is filed it will be considered sufficient if the district court's findings of fact and conclusions of law appear therein. That the District Court in this case clearly intended its Memorandum Opinion as a statement of both its findings of fact and conclusions of law is demonstrated by its statement: "Any finding of fact heretofore made which constitutes a conclusion of law is hereby adopted as a conclusion of law and any conclusion of law which is a finding of fact is hereby adopted as a finding of fact." 438 F. Supp. at 434. The District Court's Memorandum Opinion is sufficient unto itself, and it was not necessary for the trial court to make subsidiary findings on every evidentiary issue. Elam v. United States, 250 F.2d 852 (6th Cir. 1958); Stone v. Farnell, 239 F.2d 750 (9th Cir. 1957).

<sup>9. 438</sup> F. Supp. at 431. The "advertising cases" are, of course, Bates v. State Bar of Arizona, \_\_\_\_U.S.\_\_\_\_, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

<sup>10.</sup> Appellees do not pretend to be sufficiently sage as to represent to this Honorable Court that this particular case bears either national significance, as argued in the Jurisdictional Statement of Appellant TOA at 4, or significance to twenty states, as suggested

This lawsuit involved two basic aspects of the Texas Optometry Act:

- (1) The 4-2 makeup of the Optometry Board<sup>11</sup>
- (2) The tradename practice of optometry.

by Appellants Friedman, et al., in their Jurisdictional Statement at 14, n. 1 (which, if true, would indicate *insignificance* to *thirty* states), significance within the State of Texas only, or, as a practical matter, significance only as between the actual parties. Nonetheless, Appellees would emphasize that, in their view, the holding of the District Court is a narrow one with important practical limitations.

Specifically, it is fundamental that a party must suffer some injury to a legally-protected interest in order to have standing to challenge the constitutionality of a statute. In this particular case the Appellees' standing to challenge Section 5.13(d) of the Texas Optometry Act is established by the overwhelming evidence that the TSO trade name, as a source symbol, actually does convey valuable commercial information, the suppression of which injures Dr. Rogers economically and denies the consumer information about the quality, prices and availability of the sponsor's goods and services. In a different case involving a different source symbol, however, the complainant may be unable to make an adequate evidentiary showing that the trade symbol at issue actually possesses significant informative value. If that is the case, then the prohibition of the symbol itself has no real effect on the complainant's interests, and the complainant will lack the requisite standing to pursue a genuinely adverse challenge to the prohibition. So viewed, it may very well be that this case bears no major significance beyond the immediate parties. Such diminished significance, Appellees submit, presents additional, weighty justification for a summary affirmance of the District Court.

A closely-related and supportive analysis is contained in Bates v. State Bar of Arizona, supra, \_\_\_\_\_U.S. at\_\_\_\_\_, 97 S.Ct. at 2707-2708, 53 L.Ed.2d at 834, wherein this court emphasized that, in the professional commercial speech context, the overbreadth doctrine will not be recognized, but instead the complainant must demonstrate that the challenged restraint is unconstitutional as applied to him. Accord, Bigelow v. Virginia, 421 U.S. 809, 817-818, 95 S.Ct. 2222, 2230, 44 L.Ed.2d 600 (1975).

The decision below is the basis of appeal in No. 77-1164,
 N. Jay Rogers, et al v. E. Richard Friedman, et al, October Term,
 Supreme Court of the United States.

Appellants complain of the scope and breadth of the injunction and pendente lite orders enjoining enforcement not only of Section 5.13(d) of the Texas Optometry Act but "any other provision of the Act which prohibits in any way the practice of optometry under a tradename." The injunction upon which the appeal is based was entered October 27, 1977, after the filing of briefs and chambers conferences involving all parties (Appellants' Jurisdictional Statement, page 20)

On February 16, 1976 the Appellants, through the Attorney General, specifically agreed in "form and substance" to the entry of an order pendente lite exempting one of Appellee's offices "from the prohibitions of Section 5.13(d) and like 'tradename' prohibitions of the Texas Optometry Act.".12

The mass of evidence adduced in this case<sup>13</sup> and the briefs of all parties in the Court below and in the Supreme Court have addressed the basic issue in dispute, that is the tradename practice of optometry and its First Amendment consequences.

The memorandum opinion of the Court below dealt very plainly with "the inclusion of tradenames within the protected First Amendment right of commercial free speech," of the tradename's being "within the protective fold of advertising" and as "part of the consuming public's right to valuable information". The three-judge court concluded that "blanket suppression of the use of tradename

<sup>12.</sup> See Appendix B.

<sup>13.</sup> Particularly the testimony of Dr. N. Jay Rogers, Dr. Richard Friedman, Dr. Nelson Waldman, Dr. Robert Shannon and Mr. Stanley Boysen, together with the extended direct and cross-interrogatories of Dr. Lee Benham, by Appellants, Appellee and Intervenors.

results in unwarranted restriction of the free flow of commercial information". 438 F. Supp. at 431.

Since Appellants agreed to an order pendente lite relating to Section 5.13(d) and like "tradename prohibitions" in the Texas Optometry Act pending final judgment of the Court, it ill-behooves them now to complain of an identical order pendente lite or the final judgment couched in virtually the identical language of the identical import.

#### ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT CORRECTLY DETER-MINED THAT THE FIRST AMENDMENT IS VIOLATED BY A STATUTE PROHIBITING LI-CENSED TEXAS OPTOMETRISTS FROM PRAC-TICING UNDER, OR USING IN CONNECTION WITH THEIR PRACTICES, ANY TRADE NAME, CORPORATE NAME OR ASSUMED NAME.

#### A. GENERALLY.

#### 1. The Statute and its History.

Appellants note that the trade name prohibition now contained in Section 5.13(d) of the Texas Optometry Act (enacted in 1969) was originally adopted in 1959 as part of a rule by the former Texas State Board of Examiners in Optometry prior to the Texas Legislature's withdrawal of the Board's rulemaking authority. Appellants also make much over the fact that Appellee Dr. Rogers participated in the work of a committee of legislators and optometrists which led to the enacted optometry regulatory bill in 1969. Appellants further ob-

serve that Dr. Rogers was a complaining party in the Carp case before the Texas courts, as he had every right to be.

Appellants, however, have scrupulously omitted to mention several significant items of which this Court should be aware. In the first place, the so-called "Professional Responsibility Rule" was repealed by the Texas State Board of Examiners in Optometry prior to the 1969 Texas legislative session. This repeal occurred by mail ballot the efficacy of which was disputed by members of Appellant TOA but never legally resolved. The mail ballot became necessary because, for a period of two years between 1967 and 1969, the three TOA members of the then-five member Board of Examiners in Optometry refused to meet with the two non-TOA members, thus precluding a quorum. During that interregnum the

This brings forward the question: Why have the members of TOA endeavored so persistently over the years to repress the mercantile features of "commercial" optometry? The credible evidence in the record overwhelmingly establishes that TOA's true reasons have arisen largely, if not wholly, from economic self-interest. As explained by the testimony of Plaintiff:

<sup>15.</sup> Id. at 79-80.

Q. Have these disputes [between the "commercial" and "professional" modes of practice] been represented again by the factionalism that you have discussed?

A. Ves.

Q. Does that factionalism sooner or later become an economic issue?

Board failed to examine prospective licensees or otherwise function as a governmental body.

A. Yes.

Q. How and in what way does it become related to economics?

A. Well, because the big dispute between the two factions, which is strictly the question of mode of practice, has to do with competition in the market, competition in the field of opticianry and optometry and the efforts over the years by the TOA, the efforts have been to prohibit certain practices in the practice of optometry for the purpose of either eliminating or reducing the competition for the patients. So it ultimately boils down to one of economics between the two groups, one group trying to stifle the operations or limit the operations—that is, the TOA group trying to limit the operations of the non-TOA or the corporation [sic, commercial] group.

[T]he net effect primarily is increased costs to the public. That's the primary effect.

Q. How does it inure to the benefit of the TOA members?

A. Well, as the competition is lessened or reduced, and as a result of that, lesser numbers will seek the services of the commercial optometrists, the result of that is some of those members of the public who might normally or would normally seek the services of the commercial optometrists and who do not as a result of the restrictions placed upon the commercial optometrists both in the form of their inability to obtain information as a result of restricted practices in advertising as well as increased costs that the commercial optometrists are faced with and have to pass on to the public. Some of the public will then be seeking the services of the non-commercial or the so-called professional optometrists, and it is a means of driving more and more people away from the commercial practitioner to the non-commercial practitioner.

(Rogers depo. II, at 127-129) (emphasis added).

Dr. Rogers testified that "the net effect primarily is increased costs to the public." The entire record demonstrates that he was clearly correct, and also demonstrates that increased costs to the public are the hallmark and staple of so-called "professional" optometry. Dr. Rogers, himself a highly successful and respected Texas optometrist for some thirty-seven years, elaborated upon the synonymity of TOA "professional" optometry and high fees, as opposed to the lower fees charged for identical services by "commercial" optometrists:

Then, with the arrival of the 1969 Texas legislative session, representatives of the TOA and non-TOA op-

Q. In your experience in having dealt with this matter over the last forty years, what in your experience does TOA stand for?

A. Well, it stands for a certain type of outward appearance in the practice of optometry, and that is, they wish to appear on a more so-called professional appearance similar to the dentists, the lawyers, the medical doctors, and they simply want to hold themselves out in what would appear to be a more professional type, less commercial type of practice by the general physical appearance of their offices.

Q. Does this appearance, professionalism, result in any different

quality of service to the consuming public?

A. No.

Q. Does it result in any—that is the appearance of professionalism, does it result in any fee structure?

A. Yes.

Q. To the public?

A. Yes.

Q. What is the difference in the fee structure between the commercial and the so-called professional or TOA associated

optometrists?

A. The basic difference is that the so-called professional optometrists, the members of the TOA, have a fee system or fee structure where they break down their services and their service fees such as examination fees, technical fees, reevaluation fees, and there are several others to where the fee to the patient, to the public for the examination and the allied services that are part of the prices of optometry are much higher than the fees for that same service that the commercial optometrists charge. For example, the examination fee of the professional optometrist ranges anywhere from fifteen or eighteen dollars even up to as high as thirty-five or more for the examination aspect of it. So the professional optometrists derive a great portion of their net profit or their profit from the patient in the form or guides [sic, guise] of professional fees.

It's much higher than the average commercial optometrist. Id. at 120 et seq.

The consequences of enacting laws to suppress commercial information, such as that communicated by a trade name, follow a basic economic sequence. Consumers in the restricted market will lack the unimpeded opportunity to select that mix of price, quality, service, convenience.

tometric factions conferred with various state legislators with a view toward reaching a compromise on a new optometry law. The "compromise" was ultimately imposed by an arbitrator, whose decision the opposing factions agreed in advance to accept, at least in principle.<sup>16</sup>

At that time, however, certainly no one, including Dr. Rogers, could have reasonably anticipated the First Amendment problems that would eventually arise in connection with Section 5.13(d) of the new Act. Perhaps it was for that reason that the District Court in this case refused to sustain the defendants' arguments that Dr. Rogers had somehow "waived," or had become "estopped" to assert, the First Amendment defects in Section 5.13(d). Appellants wisely have not brought forward their "waiver" and "estoppel" theories to this Court. See Elrod v. Burns, 429 U.S. 347, 359 at n. 13, (1976).

That the First Amendment issues surrounding Section 5.13(d) were not reasonably foreseeable in 1969 is further indicated in that the Carp case, upon which Appellants now rely so heavily, did not involve the First Amendment topside or bottom. As the court below correctly explained:

[T]his Court notes (1) the question before the Texas Court in Carp was not constitutional but whether the Texas board had exceeded its delegated

power from the legislature, (2) the names whose use were in question were those of licensed optometrists who sold Carp their locations, and (3) the Carp decision was rendered well before the recent Supreme Court pronouncements in Va. Pharmacy Bd. v. Va. Consumer Council, supra, and Bates v. State Bar of Arizona, supra.<sup>17</sup>

Under these circumstances the Texas Supreme Court's majority opinion in Carp is even less authoritative to the issues sub judice than was Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969) to the issue of price advertising of prescription drugs considered in this Court's Virginia Pharmacy decision. See 425 U.S. at 753. As this Court observed, the First Amendment was at least invoked in the Patterson Drug case.

#### 2. The Approach of the Court Below.

As matters of fact the District Court, after carefully considering all the evidence, found:

"that a trade name is encompassed within the meaning of advertising . . ."18

#### and

"that the Texas State Optical name [TSO] has come to communicate to the consuming public information as to certain standards of price and quality, and availability of particular routine services."

In adding its explicit rejection of the defendants' arguments that the TSO name misleads the public as to

and ambience which best meets their individual need. If consumers cannot freely select among the variety of available product and service packages, then many will be charged high prices for services and products they do not need or for more expensive items than they would have purchased had adequate information existed.

<sup>16.</sup> Proceedings Before the Texas Senate Public Health Committee, May 9, 1969, on file in the record under official certificate of Charles Schnabel, then-Secretary of the Texas Senate.

<sup>17. 438</sup> F. Supp. at 430.

<sup>18.</sup> Id.

<sup>19.</sup> Id. at 431.

the responsible optometrist's identity, the District Court nonetheless properly observed that its decision has no effect on regulations requiring the posting of the attending optometrist's name or the requirement that optometrists whose names are posted work a minimum number of hours per week.<sup>20</sup> It is obvious from its Memorandum Opinion that the District Court has left the state ample leeway to devise and enforce any additional regulations deemed necessary or appropriate to enhance the qualifications of optometric licensees and to act as it sees fit in order to curtail specific abuses, whether in the form of deception, incompetence, immorality or otherwise. Indeed, a multicplicity of such regulations presently exist in Texas, totally undisturbed by the result below.

It bears repeating that nowhere have Appellants attached the trial court's factual findings as "clearly erroneous." Nor could Appellants seriously do so. For example, it is indisputably true that people do identify a trade name (or other source symbol) with a "certain quality of service and goods, the end result being that eventually the name itself calls public attention" to the product or service sponsored thereunder. That being the case, it was entirely correct for the District Court to follow the First Amendment analysis—whether terms a "balancing test" or otherwise—called for by this Court

in such controlling decisions as Bates v. State Bar of Arizona, supra; Virginia Pharmacy, supra; Linmark Associates, Inc. v. Township of Willingboro, \_\_\_\_U.S.\_\_\_, 97 S. Ct. 1614, 1618-1619, 52 L.Ed.2d 155, 160-161 (1977); and Carey v. Population Services International, \_\_\_\_U.S.\_\_\_, 97 S.Ct. 2010, 2024-2025, 52 L.Ed.2d 675, 694-695 (1977). See also Bigelow v. Virginia, supra.

#### B. THE COURT BELOW WAS CLEARLY COR-RECT TO APPLY THE FIRST AMENDMENT "BALANCING TEST".

#### 1. Commercial Content-Not "Conduct".

The District Court struck down the portion of Section 5.13(d) of the Texas Optometry Act that forbids the duly-qualified and licensed Texas optometrist to practice under or use in connection with his practice any trade name, corporate name, assumed name or any name other than the name under which he is licensed to practice optometry-meaning, with few exceptions, only his or her given name. It may be assumed for purposes of argument that Section 5.13(d) to some truistic degree regulates "conduct", as the Appellants contend. Yet, an adequate analysis cannot end there because it is also plain that Section 5.13(d) is aimed primarily at communication and, more precisely, at the *content* of the communication. The overwhelming purpose and effect of Section 5.13(d) is to suppress, restrain and fragment a cohesive package of valuable, intelligible commercial information, some typical discrete elements of which were articulated by the District Court, through prohibiting, suppressing and restraining the demonstrably efficient medium, the trade

<sup>20.</sup> Id., n. 3.

<sup>21.</sup> Id. at 431.

<sup>22.</sup> The point was recently well put in DeCosta v. Columbia Broadcasting System, Inc., 520 F.2d 499, 512 (1st Cir. 1975):

From a policy point of view, the functions served by a trademark (or service mark)—an indication of origin, a guarantee of quality, and a medium of advertisement, 3 Callman, § 66.3, p. 36—suggest association with enterprises selling their goods or services.

name itself, by which the communication is circulated within the society, thereby drastically diminishing the availability and meaningfulness of the information to members of the society.

Just as the District Court labored under no obligation to credit the defendants' evidence on this issue merely because the State of Texas offered it, this Court is not obligated to accept the Appellants' simplistic "speechconduct" dichotomy, as if a bright line separated the two, simply because the State of Texas has elected to apply those labels. Were that the penultimate analysis, then it could easily be argued that a number of this Court's decisions are incorrect. E.g., Cohen v. California, 403 U.S. 15 (1971) (exhibition of unpatriotic profanity in public building); Brandenburg v. Ohio, 395 U.S. 444 (1969) (Ku Klux Klan rally); Thornhill v. Alabama, 310 U.S. 88 (1940) (peaceful picketing); Cantwell v. Connecticut, 310 U.S. 296 (1940) (soliciting contributions); Smith v. California, 361 U.S. 147 (1959) (selling published matter for profit); NAACP v. Button, 371 U.S. 415 (1963) (solicitation of litigation); Tinker v. Des Moines School District, 393 U.S. 503 (1969) (wearing armbands in school—"symbolic" speech).

#### 2. Today's Constitutional Approach.

Instead, it is now abundantly clear that this Court has roundly rejected the superficial, label-predictive approach sought by Appellants. This Court has done so not necessarily in exactly the terms of "speech" and "conduct", for those verbalizations are largely inappropriate except in cases of incitement or breach of the peace, cf. Carey v. Population Services International,

supra, \_\_\_\_U.S. at \_\_\_\_, 97 S.Ct. at 2025, 52 L.Ed. at 695, but rather in terms of "commercial" versus "non-commercial" speech. The point is best demonstrated by Virginia Pharmacy, supra, wherein this Court, in the course of discarding the "commercial speech" doctrine of Valentine v. Chrestensen<sup>23</sup> and Breard v. Alexandria,<sup>24</sup> stated:

Since the decision in *Breard*, however, the Court has never *denied* protection on the ground that the speech in issue was "commercial speech". That simplistic approach, which by then had come under criticism or was regarded as of doubtful validity by members of the Court, was avoided in *Pittsburg Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 93 S. Ct. 2553, 37 L.Ed.2d 669 (1973).<sup>25</sup>

Just as in Virginia Pharmacy, supra; Bates v. State Bar of Arizonia, supra; Linmark Associates, supra, and Bigelow, supra, the issue now before this Court is whether the state may validly erect a sweeping, blanket prohibition of useful, harmless, non-misleading information about an entirely lawful activity simply because the state fears that its recepients will utilize the information in making private economic decisions. As this Court emphasized

<sup>23. 316</sup> U.S. 52 (1942).

<sup>24. 341</sup> U.S. 622 (1951).

<sup>25. 425</sup> U.S. at 759 (emphasis in original, footnote omitted). See also Bigclow v. Virginia, supra, 421 U.S. at 826:

<sup>&</sup>quot;Regardless of the particular label asserted by State—whether it calls speech 'commercial' or 'commercial' or 'solicitation'—a court may not escape the tas of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation".

in those cases,26 the listener's interest is substantial perhaps far keener than his desire for political dialogue; commercial speech performs an indispensable function in resource allocation by informing the public of the availability, nature, prices and, perhaps, quality of products and services; and advertising, however tasteless it may seem to some, nonetheless advances societal interests in assuring better-informed decisions. Given these considerations in light of the District Court's findings with respect to the communicative value of a trade name, it becomes manifest that Section 5.13(d) of the Texas Optometry Act must be adjudged from the same perspective as the sweeping restrictions on "commercial speech" which this Court struck down in those cases. Specifically, "[i]f there is a kind of commercial speech that lacks all First Amendment protection . . . it must be distinguished by its content". Virginia Pharmacy, supra, 425 U.S. at 761; Bates v. State Bar of Arizonia, supra, \_\_\_U.S. at\_\_\_, 97 S.Ct. at 2699, 53 L.Ed.2d at 824 (emphasis added).

#### 3. The "Balancing Test" Fits.

Accordingly, the so-called "balancing test" employed by the court below constituted a proper and correct First Amendment analysis in this case. The District Court examined the defendants' several proferred justifications for the trade name ban and weighed them against the consequent deprivation of informational interests. See 438 F. Supp. at 430. That Section 5.13(d) might have passed muster under a due process or equal protection

attach was properly deemed of limited relevance to the First Amendment question, id. at 430, n. 1,27 even though Appellants apparently continue to think otherwise.28 It is simply no answer to the constitutional issue to proclaim arbitrarily, as do Appellants, that the impact of Section 5.13(d) upon the optometrist and the consuming public is "incidental" or "indirect" when in fact the economic message itself is irreparably stifled, atomized and subdued by suppression of a traditional, widely understood, highly effective medium. Linmark Associates v. Township of Willingboro, supra, \_\_\_U.S. at\_\_\_\_, 97 S.Ct. at 1618, 52 L.Ed.2d at 162. Inevitably the public is deprived of valuable commercial information by virtue of a protection based in large part on public ignorance, and the "rationale of the advertising cases" thereby comes into play.29

#### C. THE COURT BELOW STRUCK THE COR-RECT "BALANCE".

#### 1. What Is and Is Not at Issue Herein?

In their Jurisdictional Statements the Appellants confuse and obfuscate the narrow issues before this Court with a variety of meritless contentions. Those contentions were also presented to, and necessarily rejected by, the

<sup>26.</sup> See particularly this Court's summary of Virginia Pharmacy in Bates, supra, \_\_\_\_\_U.S. at\_\_\_\_\_, 97 S.Ct. at 2699, 53 L.Ed.2d 823, 824.

<sup>27.</sup> See also Virginia Pharmacy, supra, 425 U.S. at 769.

<sup>28.</sup> See Jurisdictional Statement of Appellants Friedman, et al. at 6, 9.

<sup>29.</sup> Appellees desire to comment on certain statements found at page 8 of the Jurisdictional Statement of Appellants Friedman, et al., only to point out that the Assistant Attorney General's references to other alleged lawsuits, and the problems she has encountered in defending them, are dehors the record of this cause and, Appellees submit, entirely irrelevant to the issues at hand.

District Court, even though the court below justifiably saw no occasion to write separately in respect of each one. In addressing Appellants' arguments, Appellees respectfully submit that none should give this Court the slightest pause.

(a) Legality of the Regulated Activity—Texas law defines the "practice of optometry" in the following basic terms:

[T]he employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer nor to prescribe any drug or physical treatment whatsoever, unless such optometrist is a regularly licensed physician or surgeon under the laws of this state.<sup>30</sup>

Hence, under Texas law optometrists may examine the eyes, measure the power of vision, fit, prescribe and, as they do frequently, dispense corrective lenses. But clearly the optometrist is not lawfully a healer. An optometrist who purports to act as a healer by treating or prescribing for any diseased condition is deemed guilty of practicing medicine without a license.<sup>31</sup> An optometrist who willfully or repeatedly represents to the public that he is competent to treat or heal any disease of the eyes is

subject to having his optometry license cancelled, suspended or revoked.<sup>32</sup>

Every optometrist who practices optometry in Texas must become licensed by the Texas Optometry Board. In order to obtain the optometry license, the applicant must have completed successfully at least forty-eight months of education, approved by the Texas Optometry Board, at a reputable university or college of optometry";<sup>38</sup> the applicant must be of "good moral character";<sup>34</sup> and the applicant must pass a comprehensive scholarly and practical examination "in theoretical and practical optometry, in the anatomy, physiology and pathology of the eye as applied to optometry. . . ."<sup>35</sup> Once licensed, the optometrist must satisfy continuing education requirements as a condition of license renewal.<sup>36</sup>

Equally extensive regulations exist to protect the public against numerous varieties of fraud, deceit, incompetence and unfitness of optometrists in the course of their licensed practices. Every optometrist must conspicuously display his license in the office.<sup>37</sup> No optometrist may

<sup>30.</sup> Section 1.02(1), Texas Optometry Act (reproduced at Appendix A).

<sup>31.</sup> Section 5.05, Texas Optometry Act (reproduced at Appendix A).

<sup>32.</sup> Section 4.04(a)(11), Texas Optometry Act (reproduced at Appendix A).

<sup>33.</sup> Section 3.02(a)-(b), Texas Optometry Act (reproduced at Appendix A).

<sup>34.</sup> Id.

<sup>35.</sup> Section 3.05, Texas Optometry Act (reproduced at Appendix A).

<sup>36.</sup> Section 4.01B, Texas Optometry Act (reproduced at Appendix A).

<sup>37.</sup> Section 5.01, Texas Optometry Act (reproduced at Appendix A).

practice optometry from house-to-house or on the streets.38 The optometrist is forbidden to prescribe corrective lenses without having first made a personal examination of the prescribee's eyes.39 The optometrist may not give any spectacles or eyeglasses as a premium or inducement to the purchase of any other article.40 Fee-splitting with unlicensed persons is prohibited,41 as is affiliation with any "mercantile establishment",42 as is the use of a licensed optometrist's name on or about any premises at which the named optometrist is not "actually present and practicing optometry"43. Furthermore, the optometrist's license is subject to cancellation, suspension or revocation by the Texas Optometry Board for any gross immorality; dishonesty or misrepresentation; incompetence due to negligence; conviction of crime; habitual drunkedness or drug addition; aiding unauthorized practice; employment of solicitors; or any willful or repeated violation of the Texas Optometry Act.44

In short, the practice of optometry in Texas is "subject to extensive regulation aimed at preserving high professional standards". Cf. Virginia Pharmacy, supra, 425 U.S. at 768. Indeed, in contrast to the Virginia Pharmacy and Bates cases, there is considerably more regulation of optometrists in Texas than of pharmacists in Virginia or lawyers in Arizona. Specifically, in the field of optometry the Texas legislature has addressed the optometric examination itself and has mandated by statute the steps deemed appropriate by the state "to insure an adequate examination of a patient". 45 An optometrist's willful or repeated failure to perform any of the steps of this basic competence" examination constitutes prima facie evidence of negligence for which the optometrist's license may be cancelled, revoked or suspended, and the optometrist bears the burden of proof that the omission did not result in an inadequate examination.46

A review of the statutes described above, none of which is in issue in this case, concretely demonstrates that optometry, when practiced within the confines of the optometric license, is a perfectly legal activity in the State of Texas. The legality of optometry contrasts sharply with the illegality of employment discrimination, a prohibition against the advertising of which was upheld by this Court in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, <sup>47</sup> a case incorrectly relied on by Appellants herein.

In point of fact, Appellants seemingly would mislead this Court by suggesting that the District Court applied

<sup>38.</sup> Section 5.04(5), Texas Optometry Act (reproduced at Appendix A).

<sup>39.</sup> Section 5.07, Texas Optometry Act (reproduced at Appendix A).

<sup>40.</sup> Section 5.06, Texas Optometry Act (reproduced at Appendix A).

<sup>41.</sup> Section 5.13(b), Texas Optometry Act (reproduced at Appendix A).

<sup>42.</sup> Section 5.14, Texas Optometry Act (reproduced at Appendix A).

<sup>43.</sup> Section 5.13(e)-(i), Texas Optometry Act (reproduced at Appendix A).

<sup>44.</sup> Section 4.04(a), Texas Optometry Act (reproduced at Appendix A). Furthermore, the Texas legislature has adopted very strong preventive and punitive legislation against deceptive advertising. Art. 17.41 et seq. Tex. Bus. & Comm. Code, Deceptive Trade Practices-Consumer Protection Act.

<sup>45.</sup> Section 5.12, Texas Optometry Act (reproduced at Appendix A).

<sup>46.</sup> Section 5.12(c), id.

<sup>47. 413</sup> U.S. 376 (1973).

the "rationale of the advertising cases" so as to legalize an "illegal activity" in order that it may be advertised. Appellants appear to be concerned that various licensed Texas optometrists employed by or affiliated with Dr. Rogers will use the TSO trade name in connection with the optometry offices where they practice and thereby disclose to the public their affiliation, which, as the District Court so rightly found, the public has come to recognize as a meaningful, valuable symbol of price, quality and availability of goods and services. 49

If such occurred would the result of more information instead of less embrace an "illegal activity"? Absolutely not. The law of Texas is clear on the pivotal point, which Appellants seek so cleverly to disguise:

This Act does not prohibit an optometrist from being employed on a salary, with or without bonus arrangements, by a licensed optometrist or physician, regardless of the amount of supervision exerted by the employing optometrist or physician over the office in which the employed optometrist works, provided such bonus arrangements, if any, shall not be based in whole or in part on the business or income of any optical company.<sup>50</sup>

#### and

No person . . . engaged in the business of a dispensing optician, other than a licensed optometrist . . . shall have, own, or acquire any interest in the premises or space occupied by a licensed optometrist for the practice of optometry . . . 51

#### and

Optometrists who are *employed by other optometrists* shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed.<sup>52</sup>

In other words, under present Texas law it is perfectly legal for Dr. Rogers, himself a licensed optometrist, to employ other optometrists at varying locations. Furthermore, as a licensed optometrist Dr. Rogers is entitled under Texas law to own the offices at which the optometrists employed by him conduct their practices. Moreover—and of great significance—nowhere do the laws of Texas limit in any way the *number* of optometrists Dr. Rogers may employ or the *number* of offices he may own.

Actually, the *only* pertinent limitation imposed by Texas law, apart from the trade name ban, simply requires the employed optometrist to practice at his office using his own name without posting the names of other optometrists who do not regularly practice there. Plainly this limitation is not inconsistent with the use by the employed optometrist of a trade, corporate or assumed name sponsored by the employing optometrist *in addition* to the employed optometrist's given name, which will be

<sup>48.</sup> See, particularly, Jurisdictional Statement of Appellants Friedman, et al. at 8; Jurisdictional Statement of Appellant TOA at 4.

<sup>49.</sup> For a complete understanding of the long-time economic battle between the TOA-Appellants and Appellees see pages 3-6 of the Jurisdictional Statement of Appellant in the Companion case before this court in Rogers, et al v. Friedman, et al. 77-1164, October Term, 1977.

<sup>50.</sup> Section 5.13(c), Texas Optometry Act (reproduced at Appendix A) (emphasis added).

<sup>51.</sup> Section 5.15(d), Texas Optometry Act (reproduced at Appendix A) (emphasis added).

<sup>52.</sup> Section 5.13(d), Texas Optometry Act (reproduced at Appendix A) (emphasis added).

posted outside the office door and disclosed on the face of the license mounted on the optometrist's office wall, and perhaps elsewhere if he or she so chooses.

In conclusion, licensed optometry practiced in the manner to which Appellants object represents in no respect an "illegal activity". That being so, the use of a trade symbol in connection therewith will not convert an otherwise lawful activity into an illegal one, nor will the trade symbol propose an illegal transaction. Appellants' real objections appear to go to the *legality* under Texas law of the ownership of licensed optometrists of multiple optometry offices. Appellants, however, may not seek remedy for that grievance in this Court. Their proper forum is the Texas legislature.

(b) The District Court's Decision Does Not Allow the Optometrist to "Hide Behind" a Trade Name.—The precise holding of the court below is quite narrowly framed:

[T]his Court . . . holds that blanket suppression of the use of trade names results in unwarranted restriction of the free flow of commercial information and therefore represents an unconstitutional violation of the first amendment.<sup>53</sup>

In recognition of the limits of its holding, the District Court immediately added:

The Court would point out . . . the fact that blanket suppression of a trade name is unconstitutional does not prohibit or invalidate regulations having to do with the posting of the optometrists' names present, or the requirement that those optometrists whose

names are posted work so many hours per week at their place of business.<sup>54</sup>

Of course, neither did the District Court anywhere suggest that the state may not adopt and enforce any number of other reasonable statutes or regulations for the protection of the public. Such regulations could easily include prohibitions of trade symbols that amounted to gimmickery or bait-and-switch advertising or misleading sloganism. 55 Certainly the state might also legitimately control the number of different trade names used by a single sponsor. In order to prevent deception, confusion or "passing off" the state could validly control the similarity of trade names employed by different sponsors. Or the state might require each trade name sponsor to impose specific quality control standards for services and materials sold at each location using the sponsor's trade name. The trial court did specifically find, however, that the TSO name is not misleading to the public in terms of fixing the individual optometrist's professional responsibility to his or her patients.56

Appellants now argue repeatedly, as they argued to no avail in the trial court, that an optometrist's use of a trade name in connection with his practice results in the optometrist concealing his true identity from his patients and "hiding behind" the trade name. <sup>57</sup> Appellants rely on conclusory non-sequiturs lifted from the Texas court's majority opinion in Carp, supra none of which

<sup>53. 438</sup> F. Supp. at 431 (emphasis added, footnote omitted).

<sup>54.</sup> Id., n. 3 (emphasis added).

<sup>55.</sup> See footnote number 41.

<sup>56. 438</sup> F. Supp. at 431.

<sup>57.</sup> E.g., Jurisdictional Statement of Appellant TOA at 7, 9, 12-18; Jurisdictional Statement of Appellants Friedman, et al. at 12-14.

find probative support in the present record, together with highly selective quotations from the testimony of two biased witnesses (each a TOA member) whose testimony the District Court necessarily did not find creditable on the subject at hand.<sup>58</sup>

In actual fact there is no way that a licensed individual who practices optometry in Texas for a living can successfully "hide behind" a trade name. His identity is no more concealed when practicing under a trade name than it is when he is practicing under the employment of another optometrist which is also clearly lawful.59 If, by some bizarre method, an optometrist actually led a patient to believe that the trade name, rather than the optometrist, was licensed to practice optometry, then surely this individual's license would be promptly revoked or suspended for misrepresentation in violation of Section 4.04(a)(2) of the Texas Optometry Act. Likewise his license would be subject to revocation or suspension if, in violation of Section 5.01 of the Act, he failed to "display his license or certificate in a conspicuous place in the principal office" of his optometry practice. In truth the trade name itself has no more bearing than price advertising on whether a given optometrist is bent on deception or inclined to cut corners. That problem really is one of licensing and professional standards, which are not at issue in this case.

Yet, Appellants complain that existing safeguards are insufficient—that, regardless of the office display of the optometrist's license, the patient will have already made an irrevocable decision to stay for a complete examination prior to entering the optometry premises. Appellees fail to perceive how the optometrist's use or non-use of a trade name might affect this alleged state of affairs one way or the other. A patient so motivated is likely to behave the same way in either case. The patient has the same access to the identity of the attending optometrist in either case. Appellants' argument misses the point.

Appellants' real fear appears to be that people will patronize establishments operated under trade names with which people are familiar and in which they have confidence. That is surely no evil unto itself. Linmark Associates v. Township of Willingboro, supra, \_\_\_\_U.S. at \_\_\_\_, 97 S.Ct. at 1619, 52 L.Ed.2d at 164. If any room for concern exists, it can relate only to the possibility that a trade name—like price advertising—does not provide a complete foundation on which to select a practitioner. These concerns were answered dispositively, however, by this Court in Bates v. State Bar of Arizona, supra:

[I]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated

<sup>58.</sup> Appellees respectfully invite the Court to read the cross-examinations of these two TOA witnesses, Dr. Waldman and Dr. Shannon. See Deposition of Dr. Nelson Waldman at 45, 47-48, 50, 53, 71-73; Deposition of Dr. Richard Shannon at 88-90, 92-93, 96-98, 100. The District Court's credibility determinations, of course, are not properly before this Court. In any event, the testimony of these two witnesses on cross-examination presents ample justification for finding their direct testimony, given at the instance of Appellants, widely off the mark of the trade name question.

<sup>59.</sup> Section 5.13(c), Texas Optometry Act (reproduced at Appendix A).

Jurisdictional Statement of Appellant TOA at 17-18.

enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. 61

As this Court then observed, "the preferred remedy is more disclosure, rather than less".62 "More disclosure" to the consuming public is assuredly achieved when a trade name is used. The trade name efficiently provides the public with the cohesive package of information described by the court below, and it also informs the public that the user is employed by or associated with a particular sponsoring person, organization or firm. The consumer is at all times free to make his or her own decisions, based on his or her own perception of the sponsor's goodwill, whether to patronize the trade name user. In the meantime, the use of a trade name does not diminish to the slightest degree the user's existing legal obligation to make conspicuous disclosure of the individual optometrist's identity. Consequently, the issues in this case simply do not present a question of concealment of an optometrist's identity or "hiding behind" a trade name. The issues in this case go, instead, to whether the state may constitutionally deny the consumer more information about an optometrist's perfectly lawful business associations than the consumer would have without the information because the state assumes the consumer is "better off" without the information, or that the consumer

will act "irrationally" with it. See Linmark Associates, supra, \_\_\_\_U.S. at\_\_\_\_, 97 S.Ct. at 1620, 52 L.Ed.2d 165.

(c) The State of Texas Remains Free to Require Whatever Professional Standards It Wishes of Its Optometrists.—The only state statute now at issue is the portion of Section 5.13(d) that effects a sweeping, blanket prohibition against the licensed Texas optometrist's practicing under, or using in connection with his practice, any trade name, corporate name. By now it should be thoroughly obvious that high professional standards for Texas optometrists are, to a very substantial degree, guaranteed by the close regulation to which those optometrists are subject, as was the case with the pharmacists in Virginia Pharmacy and the lawyers in Bates v. State Bar of Arizona.

The state maintains, of course, substantial interests in the regulation of its professions and in promoting the public health and welfare. Because the state's interests are substantial, Appellees do not and need not contest the state's authority to set whatever professional standards it wishes of its optometrists, to subsidize them or to protect them from competition.

Appellees merely submit that the trade name ban constitutes another example of a state's attempt to protect the citizenry by keeping people in ignorance about a perfectly legal activity and perfectly legal business affiliations. Yet, the trade name ban does not directly affect

<sup>61.</sup> \_\_\_\_U.S. at\_\_\_\_, 97 S.Ct. at 2704, 53 L.Ed.2d 829-830 (footnote omitted, emphasis added).

<sup>62.</sup> Id.

<sup>63.</sup> Unless, of course, the State of Texas intends to employ other provisions of the Texas Optometry Act not directly addressed to trade names, e.g., Section 5.11, but instead to commercial advertising generally and mode of practice, in an effort to suppress indirectly what the unconstitutional trade name ban suppresses directly. See part II, *injra*. Only the Appellants know their own intentions.

professional standards one way or another. It affects them only through the reactions that the Appellants assume people will have to the free flow of commercial information—i.e., Appellants fear that people will exercise their own informed, deliberate, private choices about whether, when and where to go for visual examinations and lenses.

The information conveyed by a trade name, however, is not in itself harmful; it clearly is relevant to those choices; and with more information in hand, rather than less, people may be expected to perceive their own best interests. Correspondingly, it can surely be assumed that most, if not all, trade name sponsors will have substantial interests in satisfying their customers and in advancing their goodwill. Otherwise the public will surely develop negative perceptions of the services and materials offered under the trade name and people will decline to patronize the trade name establishment.

This exercise of choice represents a vital thread in connecting fabric of our predominantly free enterprise economy. Through blanket suppression of trade name communication the state seeks to suppress an invaluable, harmless, convenient medium of information useful to the public for making personal economic decisions in connection with a perfectly legal activity. "[I]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." Virginia Pharmacy, supra, 425 U.S. at 770. The question, Appellees submit, simply admits of no material relationship to professional standards. Appellants' protestations

to the contrary<sup>64</sup> lack foundation in either reason or the record. They should be summarily rejected.

#### 2. The Unconstitutionality of the Trade Name Ban Follows Directly from This Court's Decisions in the Advertising Cases.

(a) The Free Flow of Commercial Information is Indispensable.—The premise upon which speech that does "no more than propose a commercial transaction" is entitled to a measure of First Amendment protection was well-explained by this Court in Virginia Pharmacy, supra:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [Citations omitted]. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. 65

The court below made specific, uncontested, now-binding factual findings that a trade name is encompassed within the meaning of commercial advertising and that a trade name communicates valuable consumer information "as to certain standards of price and quality, and availability of particular routine services". 66 As has been

<sup>64.</sup> Jurisdictional Statement of Appellants Friedman, et al. at 15.

<sup>65. 425</sup> U.S. at 765 (emphasis added).

<sup>66. 438</sup> F. Supp. at 430-431.

noted on several occasions herein, a trade name also discloses to the consuming public a business affiliation that is perfectly legal under Texas law.

Impressively, it does each of those things without relaxing to the slighest degree the professional responsibility and professional standards fixed for optometry by statutes totally independent of the trade name ban. Indeed, it is worthwhile at this point to recall that the very essence of optometry—the measurement of visual power—is itself regulated in Texas by a statute that sets forth in sequential order the specific steps of an optometric examination deemed "adequate" by the state legislature. Apart from the trade name ban found at Section 5.13(d), the numerous protective features of the Texas Optometry Act govern all licensed Texas optometrists—trade name and nontrade name—in like manner and to like degree.

The foregoing considerations conclusively demonstrate that the District Court was correct in finding that a blanket trade name ban does not really address "dangers to the doctor/patient relationship", or the "deterioration of the quality of eye care", or the "practical 'concealment' of the optometrists' identity", or the "potential for deception and misrepresentation inherent in an assumed name practice". Instead, Section 5.13(d) of the Texas Optometry Act is directly calculated to force licensed optometrists to conceal from themselves and from their patients the real-life fact that they earn their livelihood in lawful association with a person, company or organization whose trade symbol triggers substantial, meaningful public

perceptions. Cf. Bates v. State Bar of Arizona, supra, \_\_\_\_ U.S. at \_\_\_\_, 97 S.Ct. at 2701, 53 L.Ed.2d at 826. Yet, under this Court's advertising decisions, the consumer is constitutionally entitled to his or her perceptions, and to that end the free flow of commercial information becomes indispensable.

(b) A Trade Name Conveys "Basic Factual Content", and More, With No Loss of Dignity.-Certain of this Court's analyses in the Bates decision, wherein the Court struck down a blanket prohibition of price advertising by lawyers, bear particular relevance to the question of commercial communication in optometry by means of a trade name. At an early stage of its First Amendment discussion in Bates, this Court took occasion to note that the Arizona State Bar's criticism of fee advertising applied with little force to some of the "basic factual content" of advertising: the lawyer's name, address, office hours, telephone and the like. 69 Appellees herein respectfully submit that a trade, corporate or assumed name utilized by a licensed Texas optometrist likewise conveys "basic factual content"—the optometrist's association with the trade name sponsor—which is merely another item of information that the public is entitled to have readily at hand. That the trade name also connotes more than this "spartan fare" ought not be allowed to subtract from the public's entitlement to its free availability as a message about who is offering what, where, and in what lawful business mode.

In *Bates* this Court then noted that bankers and engineers advertise, yet their professions are not considered "undignified". The fact is that bankers, engineers

<sup>67.</sup> Section 5.12, Texas Optometry Act (reproduced at Appendix A).

<sup>68. 438</sup> F. Supp. at 430.

<sup>69.</sup> \_\_\_\_U.S. at\_\_\_\_\_, 97 S.Ct. at 2700, 53 L.Ed.2d at 825 n. 18:

<sup>70.</sup> \_\_\_\_U.S. at\_\_\_\_, 97 S.Ct. at 2701-2703, 53 L.Ed.2d at 827.

and many other professionals-even medical doctors-also frequently practice under trade names. How is the public health or welfare affected differently when a licensed physician posts a sign over his office or places an advertisement calling his practice the "Women's Center", or a licensed lawyer practices his profession under the trade name "Legal Clinic", or a licensed optometrist uses the trade name "Texas State Optical"? In simple fact the public health and welfare are not adversely affected in any of these examples. Instead, their effect is to reach out and service the community by more readily indicating the availability of the respective markets. That a given trade name, for example the TSO name, may also possess additional value to consumers through its reputational indications of the sponsor's prices and the quality of the sponsor's goods and services serves to advance, not subvert, society's right to the opportunity to exercise informed choices.

(c) The Evidence on Economic Effects and Quality of Eye Care.—In the trial court the Appellees presented convincing expert testimony in support of these propositions. Dr. Lee Benham is a Professor of Economics at Washington University in St. Louis, Missouri.<sup>71</sup> Dr. Benham, unlike the witnesses offered by Appellants, has absolutely no personal interest in whether optometrists should be permitted to use trade names in their practices. In discussing the utility of a commercial trade symbol as a form of valuable advertising, Dr. Benham testified:

As noted on page 423 of our October, 1975, article in the Journal of Law and Economics, ". . . the removal of commercial stimuli from the environment (including advertising, brand name identification, and identification with well-known establishments) limits consumers' knowledge of current or potential alternatives and hence also limits their response to those alternatives".<sup>72</sup>

Dr. Benham gave the following explanation for his opinion:

One of the most valuable assets which individuals have in this large mobile country is their knowledge about trade names. Consumers develop a sophisticated understanding of the goods and services provided and the prices associated with different trade names. This permits them to locate the goods, services and prices they prefer on a continuing basis with substantially lower search costs than would otherwise be the case. This can perhaps be illustrated by pointing out the information provided by such names as Sears, Neiman-Marcus or Volkswagen. This also means that firms have an enormous incentive to develop and maintain the integrity of the products and services provided under their trade name[s]. The entire package they offer is being judged continuously by consumers on the basis of the samples they purchase.

If there were no trade names, individuals would have much greater difficulty obtaining information about the range of providers. They might know the providers in a given community well, but if they moved or if some of the providers move, the problems of acquiring new information would face them.

<sup>71.</sup> This Court is already familiar with Dr. Benham's studies on the effects of prohibitions of commercial advertising in professional fields. See *Bates v. State Bar of Arizona*, supra, \_\_\_\_U.S. at\_\_\_\_\_, 97 S.Ct. at 2706, n. 34, 53 L.Ed.2d at 832.

<sup>72.</sup> Deposition of Dr. Lee Benham taken May 3, 1976, at question 14 (emphasis added).

Without trade names, the generality of the information available would be reduced.

For a product which is not frequently purchased, like eyeglasses, the restrictions on information may have particularly severe consequences.<sup>73</sup>

Thereafter, Dr. Benham focused specifically on the relationship between frequency of trade name communication and consumer prices for visual services and materials:

Restrictions on the use of trade name[s] will mean that consumers are less informed about their options. Prices will rise and, because of the higher prices, fewer people will obtain eyeglasses.

It is quite straighforward. Prices increase when consumers are less informed and competition decreases. Commercial providers can be hurt substantially if limitations are placed on the type of information they can provide to consumers. Placing limits on the use of a trade name is one of the most effective ways of limiting the information provided.

Our 1975 study in the Journal of Law and Economics finds that in states where less commercial information is available, (and trade names are an important part of this) the prices tend to be higher. In that study we also found that the less well-educated consumers were more adversely affected by the restrictions on information than those with more education. The prices tend to go up for the less

educated, lower income individuals when such restrictions are imposed.<sup>74</sup>

\* \* \*

Dr. Benham gave further testimony concerning the correlation, if any, between quality of eye care and the use of commercial trade names. He testified that he has personally examined this question and has found no systematic evidence to suggest that, for those who receive eye care, the quality of care is lowered in a trade name environment. Instead, Dr. Benham concluded, the quality of eye care will tend to be lower when the information conveyed by a trade name is repressed. Fewer people who need visual services and materials will obtain them, and many of those who do will obtain them less frequently.<sup>75</sup>

Dr. Benham's observations that eye care prices tend to increase as commercial stimuli (including trade names) are repressed, and that no demonstrable linkage exists between use of a trade name and low-quality eye care, are solidly confirmed by the record in this case. The proof before the District Court irrefutably established that the non-commercial, non-trade name optometrists offered as witnesses by the Appellants charge routine vision examina-

<sup>73.</sup> Id. at question 16 (emphasis added).

<sup>74.</sup> Id. at question 18 (emphasis added). Cf. also Virginia Pharmacy, supra, 425 U.S. at 763:

<sup>&</sup>quot;Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet, they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent".

<sup>75.</sup> Deposition of Dr. Lee Benham taken May 3, 1976, at questions 21, 26.

tion fees ranging from fifty percent to one hundred fifty percent in excess of the fees typically charged by TSO-affiliated optometrists and other trade name-affiliated "commercial" optometrists in Texas. Furthermore, the non-commercial, non-trade name optometrists customarily charge their patients certain additional fees for "services" related to dispensing optical merchandise (eyeglasses and contact lenses), which in reality are nothing more than disguised mark-ups on the commodities.<sup>76</sup>

With respect to the question whether commercial merchandising techniques have led to any deterioration in the quality of eye care services or materials, the credible testimony in the record, which the District Court necessarily credited, is firmly to the effect that they have not.<sup>77</sup> Instead, the longtime dispute between the "commercial" and non-commercial factions in Texas optometry, which has largely been a dispute between the non-members and the members of Appellant TOA, has focused overwhelmingly on the use of advertising as a mode of doing business.<sup>78</sup> The restraints on advertising by optometrists in Texas, which include the suppression of practice under trade names, are rooted largely in habit and tradition, not

in present-day objective fact. As in *Bates*, *supra*, "habit and tradition are not in themselves an adequate answer to a constitutional challenge". \_\_\_U.S. at\_\_\_\_, 97 S.Ct. at 2703, 53 L.Ed.2d at 828.

(d) A Trade Name Is Not "Inherently" or "Inevitably" Misleading.—Just as the State Bar of Arizona argued in Bates that price advertising of legal services would be "inherently misleading", Appellants herein argue, as they argued in the court below, that the use of a trade name in connection with multiple-office optometry would be "deceptive per se"—that it "would inevitably constitute "'puffing'". Moreover, in an effort to escape this Court's dispositive reasoning in Bates, Appellants seize on the findings of the District Court that people identify a trade name with a "certain quality of service and goods", and that the TSO name has come to communicate "certain standards of . . . quality . . . of particular routine services." 180

In Bates, of course, this Court took care to lay aside "the peculiar problems associated with advertising claims relating to the quality of legal services", noting that such claims might be deceptive, misleading or even false since they "are not susceptible to precise measurement or verification". Appellees readily accept the validity of these observations. For several important reasons, however, Appellants must fail in their efforts to extend those observations to the case presented by this record.

<sup>76.</sup> See Deposition of Dr. Nelson Waldman at 55, 60, 61-71; Deposition of Dr. James J. Riley at 119-121. See also Deposition of Dr. Hugh Sticksel, Jr. at 33, 34, 36-38; Deposition of Dr. John B. Bowen at 10-13; Deposition of Dr. E. Richard Friedman at 68-70, 96, 99, 116; Deposition of Dr. Chester Phieffer at 44-45, 84-85, 90, 94. Compare Deposition of Dr. N. Jay Rogers taken April 6, 1976, (hereinafter called "Rogers depo. II") at 120-125; Deposition of Dr. Sal Mora taken February 55, 1976, (hereinafter called "Mora depo. I") at 7-9.

<sup>77.</sup> Mora depo. I at 10-11; Rogers depo. I at 103; Rogers depo. II at 118-120; Deposition of Dr. E. Richard Friedman at 14-15.

<sup>78.</sup> Id. See also Dr. Friedman's deposition at 10-21, 102-104.

<sup>79.</sup> Jurisdictional Statement of Appellants Friedman, et al. at 11.

<sup>80. 438</sup> F. Supp. at 431 (emphasis added).

<sup>81.</sup> \_\_\_\_U.S. at\_\_\_\_\_, 97 S.Ct. at 2700, 2709, 53 L.Ed.2d at 825 (emphasis added). To similar effect see Virginia Pharmacy, supra, 425 U.S. at 771 n. 24.

In the first place, a vast difference exists between an advertising claim relating to the quality of an article or a service and the public's perceptions of the quality possessed by an article or service as a function of source symbol identification. Specifically, nowhere have Appellants contended that the source symbol "Texas State Optical" or "TSO" purports by its own syntax to state any claim to any palpable degree of quality. The case might be different if the trade name in question were "Perfect Vision" or "Top-Notch Optical". But if that were the case, Appellees would not quarrel for a moment with the state's authority to suppress such a deceptive trade symbol. Surely the District Court would have felt the same way.

Perhaps it is because Appellants realize that the case actually presented is not the case they wish the Court to see that Appellants do not contend the TSO name itself to be deceptive or misleading to the public. This omission is in sharp contrast to the State Bar of Arizona's argument, rejected by this Court in *Bates*, that the trade name "Legal Clinic" constituted misleading advertising.—
U.S. at —, 97 S. Ct. at 2708, 53 L.Ed.2d at 834.

Second, Appellants have simply failed to take account of the nature of the communicative role played in our society by a bona fide, non-deceptive, non-coercive, in-offensive trade symbol. A trade name is but a variation of a trademark.

To some extent the two terms overlap, but there is a difference, more or less definitely recognized, which is that, generally speaking, the [latter] is applicable to the vendible commodity to which it is affixed, the [former] to a business and its goodwill. [Citation omitted]. A corporate name seems to fall more appropriately into the [former] class. But the precise difference is not often material, since the law affords protection against its appropriation in either view, upon the same fundamental principles.82

Thus, either a trade name or a trademark is "merely a convenient means for facilitating the protection of one's goodwill in trade", 83 the "primary and proper function of [which] is to identify the origin or ownership" 84 of the goods or services sponsored thereunder. "In short, the trademark [or trade name] is treated as merely a protection for the goodwill, and not the subject of property except in connection with an existing business". 85

Yet, for many years the common-law of every state in the union has afforded considerable legal protection to valid trademarks and trade names. 86 Additional protection for a trade name that also functions as a trademark or service mark in commerce is available through the registration procedures provided by Congress in the Lanham Act. 87 These state and federal protections exemplify "the law's recognition of the psychological value of symbols. If it is true that we live by symbols, it is no

<sup>82.</sup> American Steel Foundries v. Robertson, 269 U.S. 372, 380 (1926).

<sup>83.</sup> United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 98 (1918).

<sup>84.</sup> Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 413 (1916).

<sup>85.</sup> Id., 240 U.S. at 415.

<sup>86.</sup> See generally 1 J. McCarthy, Trademarks and Unfair Competition, Section 9:1 (1973).

<sup>87. 15</sup> U.S.C. Section 1051 et seq. See McCarthy, supra, Section 9:6.

less true that we purchase goods [and services] by them."88

In this litigation the State of Texas has elected to take the truly extreme position that all trade names in an entire professional economic marketplace are so "inevitably" misleading that none deserves protection. If such a contention possessed the slightest merit would the law of unfair competition in general have developed with great consistency, as it has, over the past seventy years in fifty states—with the courts standing ready to grant injunctions and damages against infringers? Would not those courts have asked, at least on occasion, whether the infringee's "investment in advertising and quality control which is often considerable" was really worth protecting?

In fact, courts have had occasion to ask that question. Interestingly, their responses have remarkably resembled, in functional terms, Justice Brandeis's classic admonition in the First Amendment case of Whitney v. California:<sup>90</sup>

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.<sup>91</sup>

In Smith v. Chanel, Inc., 92 for example, the court held that, in the absence of misrepresentation or confusion as to source or sponsorship, a seller in promoting his own goods may freely use the trademark of another to compare his goods with the other's. This holding was said to rest on the public policy favoring a free, competitive economy in which the trademark owner is properly exposed to, not insulated from, the pressures of price and quality competition. Similarly, in De Costa v. Columbia Broadcasting System, Inc., 93 the court explained that source symbol:

[p]rotection at present has the merits of inherent limitations: the existence of a trade, business, or profession where the "good-will" to be protected has been subjected to the acid test of the willingness of people to pay for goods or services;

\* \* \*

Furthermore, the question has not gone unnoticed by the Congress, although again the solution prescribed is a sensible and selective one—not a capricious brickbat approach as Appellants desire. Specifically, under the Lanham Act a source symbol that "consists of or comprises . . . deceptive . . . matter" is unregistrable on either the Principal Register or the Supplemental Register.<sup>94</sup>

<sup>88.</sup> Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U.S. 203, 205 (1942).

<sup>89.</sup> Beer Nuts, Inc. v. King Nut Company, 477 F.2d 326, 328 (6th Cir. 1973).

<sup>90. 274</sup> U.S. 357 (1927).

<sup>91.</sup> Id., 274 U.S. at 377 (concurring opinion), quoted in Linmark Associates, Inc. v. Township of Willingboro, supra, \_\_\_\_U.S. at\_\_\_\_, 97 S.Ct. at 1620, 52 L.Ed.2d at 164-165.

<sup>92. 402</sup> F.2d 562, 569 (7th Cir. 1968).

<sup>93. 520</sup> F.2d 499, 513 (1st Cir. 1975) (emphasis added). Cf. also *Prestonettes v. Coty*, 264 U.S. 359, 369 (1924): "If the defendants' rebottling the plaintiff's perfume deteriorates it and the public is adequately informed who does the rebottling, the public, with or without the plaintiff's assistance, is likely to find it out".

<sup>94. 15</sup> U.S.C. Sections 1052(a), 1091. In the leading case of Gold Seal Co. v. Weeks, 129 F. Supp. 928, 934 (D.D.C. 1955), affirmed 230 F.2d 832 (D.C. Cir. 1956), the court said "deception

The proprietor of such a mark is thereby deprived of the Act's notice provisions and remedies as against infringing competitors. This deprivation must surely constitute an enormous dis-incentive to adopt and use a deceptive trade symbol.

In conclusion, Appellees respectfully submit that Appellants have overlooked the law's existing sensitivity to their "quality" concerns, and that abundant sources of legal authority, free market self-interest and common sense stand available, independently of the blanket trade name ban, to deal effectively with deceptive or misleading source symbols. Simultaneously, however, Appellees are unprepared to accept the premise that American courts and the United States Congress have protected hundreds, perhaps thousands, of "inevitably" misleading trade names over the past seventy years. If all trade names become "inevitably" misleading when used in connections with optometry, then surely we must presume-without the slightest substantiating experience or authority—that the same evil infects innumerable other fields of trade, commerce and professional endeavor, and Appellants herein are the first to discover it.

Third, it must be remembered that the consumer's mental associations evoked by a trade symbol may be unfavorable as well as favorable To the extent a trade name user engages in practices that evoke favorable associations, the trade name itself may thereby come to symbolize the association and may thereby encourage patronage. If, on the other hand, the trade name users

do a poor job of engaging in favorable practices or permits their competition to outperform their establishments, then the sponsor's trade name may come to symbolize ill will and discourage further patronage. In these important respects, clearly, it is more probable that the consumer will be in a position to make an informed decision with the trade name than without it.

In response to Appellants' concerns, Appellees would readily agree that the public ought to be able to expect a minimum degree of quality and skill on the part of visual practitioners. That is precisely what the Texas licensing and continuing optometric education laws are designed to allow. Beyond the minimum level, however, a given member of the public may or may not associate any additional degree of quality or skill with a practitioner's trade name—whether the professional be a doctor, a lawyer, a banker, an engineer, a pharmacist, an optometrist or otherwise.

Quality and skill are but a few of the mony discrete elements—for example integrity, accessibility, prices, ready transferability of records, availability of adjustments or refunds, credit without additional cost, efficiency of operation, courtesy, reliability, convenient hours, single location for complete care and a plethora of other elements—that the public has legitimately come to associate with the trade name, Texas State Optical. It is surely a tribute to the ability and the standards demonstrated over the past forty years by Dr. Rogers that the TSO name has come to symbolize a high degree of quality and skill on the part of TSO-affiliated practitioners. Beyond that proven fact, however, it cannot reasonably be argued that a trade name, in the abstract, signifies

is found when an essential and material element is misrepresented, is distinctly false, and is the very element upon which the ansumer relies in purchasing one product over another".

any degree of quality or skill above that required in order to maintain a license to practice optometry, which every licensed optometrist is required to post in his office in any event.

Strictly speaking, then, all Texas optometrists, regardless of whether they use a trade name, have the same opportunities to acquire a reputation for quality. The trade name itself merely constitutes a convenient, efficient medium of harmless, valuable commercial information readily available for utilization by those consumers who choose to identify with it.95 If a particular trade name also happens to evoke perceptions as to quality, or lack thereof, then so be it. The State properly ought to have the power to suppress this efficient medium of information and the useful perceptions it evokes only when the trade symbol itself is deceptive or misleading, which of course has never really been an issue with respect to the TSO name involved in this case. See Virginia Pharmacy, supra, 425 U.S. at 771, n. 24. That being so, the unconstitutionality of Section 5.13(d) of the Texas Optometry Act follows directly and naturally from this Court's recent advertising decisions.

### 3. The Insufficiency of the Carp Case as Justification for the Trade Name Ban.

Appellants rely almost fanatically on the case of *Texas State Board of Examiners in Optometry v. Carp*, 412 S.W.2d 307 (Tex. Sup. 1967) but, as the three-judge court noted, that reliance is misplaced for several reasons. 438 F. Supp. at 430.

In Carp the Texas Supreme Court considered the question of whether the Board of Examiners had exceeded its statutory powers by adopting the Professional Responsibility Rule which included a ban on the practice under trade names. The Court's holding was simply that the Board had not exceeded its statutory rule-making powers by adopting the rule.

As the three-judge court noted there were no federal constitutional questions raised or addressed in the Carp case and the case was decided almost ten years before the decisions of this Court in the Virginia Pharmacy and Bates cases. In Virginia Pharmacy the price advertising statute had been upheld by a federal district court in a suit that actually raised First Amendment objections to the statute but was decided primarily on Due Process and Equal Protection grounds. The finding of the district court in Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969) that the dispensation of prescription drugs "affects the public health, safety and welfare," Id. at 824-825, did not prevent this Court from examining the evidence in the Virginia Pharmacy case under First Amendment standards and holding that the statute banning advertising unconstitutional. When the evidence in this case is similarly judged by First Amendment standards the trade name prohibition must also fail.

<sup>95.</sup> Just as it is unlikely that many people go to a lawyer in order to find out whether they have a clean bill of health, it is unlikely that many people go to an optometrist in order to find out whether they have blurred vision. The lawyer's client may not fully appreciate the detail involved in the lawyer's diagnostic role, but the client who needs a will or a divorce is usually able to identify the service he or she desires at the level to which price advertising lends itself. Bates v. State Bar of Arizona, supra, \_\_\_\_\_U.S. at\_\_\_\_\_\_, 97 S.Ct. at 2704, 53 L.Ed. at 829. This is also certainly true of the relationship between the patient with blurred vision and the level to which a Texas optometrist's office marked by a Texas State Optical sign lends itself.

The persuasive impact of Carp is weakened even further upon examination of the dissenting opinion of Justice Smith. Even though Justice Smith was not applying the stringent First Amendment standards that must be used in this case he found that "[t]here is no evidence that the practice of optometry under trade or assumed names in multiple offices injuriously affects the public health." 412 S.W.2d at 317. Justice Smith noted that there was "a complete absence of testimony given by patients or others which even remotely suggested that the care given to patients in Respondents' establishments located throughout the State was any less satisfactory to the patient, than the care given in the offices of individual practitioners." Id.

In this case there is also a complete lack of testimony from consumers or any individuals other than optometrists that practice under a trade name is injurious to the public. In fact, even the testimony of the optometrists given on behalf of Appellants was little more than speculation as to possible problems resulting from a trade name practice.

The ten year old Carp case is completely and totally insufficient as a justification for the trade name ban. The evidence presented to the three-judge court established that the trade name ban cannot be justified on grounds that it is necessary to protect the public and in fact established that the ban actually harms the public.

#### 4. The Blanket Trade Name Ban May Not Be Justified as a Mere Time, Place or Manner Limitation on Free Commercial Speech.

Appellants present for the first time in their Jurisdictional Statement the argument that the prohibition of practice under a trade name is justified as "a valid restriction on the manner of expression." See Appellants' Jurisdictional Statement p. 15. In support of this argument they quote language from the *Virginia Pharmacy* case to the effect that time, place and manner restrictions have often been upheld but they fail to include the rest of the paragraph which reads:

Whatever may be the proper bounds of time, place and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute which singles out speech of a particular content and seeks to prevent its dissemination entirely. 425 U.S. at 771 (emphasis added).

Here, as in Virginia Pharmacy, the state has singled out speech of a particular content, trade name information, and "seeks to prevent its dissemination completely."

The prohibition of Section 5.13(d) is absolute. It does not ban only deceptive trade names or the means by which a trade name might be conveyed to the public. The time, manner and place restrictions that have been upheld by this Court have not totally prohibited the dissemination of particular information. Compare Kovacs v. Cooper, 336 U.S. 77 (1949) (statute restricting the use of loudspeakers to broadcast information); Adderly v. Florida, 385 U.S. 39 (1966) (upholding a trespass statute as a valid restriction on place of demonstrations); Gragned v. City of Rockford, 408 U.S. 104 (1972) (statute prohibiting loud noise near schools); and Cox v. New Hampshire, 409 U.S. 109 (statute requiring issuance of parade permits).

This Court has implicitly recognized that trade names such as "Women's Pavilion" and "Legal Clinic" convey

information to the public and are not inherently misleading. Bigelow v. Virginia, 412 U.S. 809 at 822 (1975) and Bates, \_\_\_\_U.S.\_\_\_\_, 97 S.Ct. \_\_\_\_\_, 53 L.Ed.2d at 834 (1977). An outright prohibition of trade names single out speech of that particular content and effectively prevents the public from receiving it in any form.

The case of Linmark Associates, Inc. v. Township of Willingboro, \_\_\_U.S.\_\_\_, 97 S.Ct. \_\_\_, 52 L.Ed.2d 155 (1977) presents an extremely helpful analysis of time, place and manner restrictions. In Linmark an ordinance prohibited the use of "For Sale" signs on the front lawns of houses. In rejecting the contention that the ordinance was a valid time, place or manner restriction the Court noted two important considerations. \_\_\_U.S. \_\_\_, 97 S.Ct. \_\_\_, 52 L.Ed.2d at 162.

First the Court considered whether or not the ordinance left open ample alternative channels for communication. The alternatives available to use of "For Sale" signs, such as newspaper advertising and listing with real estate agents involved more cost and were less effective media for conveying the message of a "For Sale" sign. Similarly, the alternatives to the use of a trade name are also unsatisfactory. Costs of advertising will increase if each optometric office must advertise separately rather than having a single trade name advertisement that benefits several offices. More importantly, there are no other truly effective means for conveying the message found in a trade name. Buyers of housing look for "For Sale" signs and consumers in the marketplace look for trade names when they seek goods and services. The prohibition of practice under a trade name, just as the prohibition of "For Sale" signs, does not leave open ample alternative channels for communication.

The Court in *Linmark* also considered whether the ordinance in question was genuinely concerned with the place of speech and concluded that it was not. The Court concluded that:

"Willingboro has proscribed particular types of signs based on their content because it fears their "primary" effect that they will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication does not transform this into a time, place or manner case.

— U.S. —, 97 S.Ct. —, 52 L.Ed.2d at 163.

The State here is also restricting trade names because of their "primary effect" which is to induce consumers to act upon the information, that is, spend their dollars with the optometrist who practices under a trade name. That the prohibition only applies to trade name useage does not transform this case into a time, place or manner case and the statute cannot be sustained as a valid restriction on time, place and manner, because it is no more than a blanket suppression of speech content.

#### II. THE INJUNCTION AND ORDERS PENDENTE LITE ENTERED BY THE DISTRICT COURT PRESENT NO BARRIER TO SUMMARY AF-FIRMANCE.

The authorities cited by Appellants<sup>96</sup> for the proposition that the District Court's injunction is too broad in scope are not in point. The *United Transportation Union*<sup>97</sup>

<sup>96.</sup> Appellants' Jurisdictional Statement, pp. 17-18.

<sup>97.</sup> United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 581 (1971).

and Korematsu<sup>93</sup> cases involved situations where lower courts had gone beyond the record in framing their decrees, the effect being impermissibly to invade constitutionally protected rights. The Solesbee<sup>99</sup> case simply stands for the elementary proposition that courts will not reach constitutional issues not fairly raised by the evidence.

An instructive case is Green v. Connally, 330 F. Supp. 1150 (D. D.C. 1971, Three-Judge Court), aff'd sub nom. Coit v. Green, 92 S.Ct. 564 (1971). Plaintiffs, Negro taxpayers in Mississippi, sued the Internal Revenue Service for injunctive and declaratory relief on the theory that the granting of tax-exempt status to racially-segregationist private schools was in violation of the Internal Revenue Code or, alternatively, that sections 170 and 501 of the Code violated the Constitution. Parents of white students attending the private schools intervened in support of IRS, but IRS suddenly announced a change in its interpretation of the law so as to agree with the plaintiffs on the major issues. The Court then concluded that it agreed with the IRS's new position, and IRS argued that the suit was moot or else plaintiffs were entitled only to very limited declaratory relief.

The Court disagreed with IRS, stating:

In the context of this case we cannot limit the protection of plaintiffs' rights to a mere declaration of the proper construction of the Internal Revenue Code. Taking into account the conditions in Mississippi which have already led to denial of plaintiffs' rights in the past, we conclude that protection to which they are entitled includes effective "directives and procedures satisfactory to this Court that the school (receiving tax exemption and deductibility) is not part of a system of private schools operated on a racially segregated basis." 330 F. Supp. at 1171.

The Court proceeded to formulate a lengthy and detailed injunction against IRS so as to "protect plaintiffs from vitiation of their right to be free of the consequences of Government support of racially discriminatory schools, private or public." 330 F. Supp. at 1177.

The Court was charged and remains concerned with avoiding vitiation of that right by either a construction or an application that undermines the protection of the rights safeguarded by the Code as properly construed. *Id.* (emphasis added)

The Court's concern with affording complete relief represented nothing out of the ordinary for federal courts, nor did it turn on the fact that the case involved overtones of racial discrimination. This point is demonstrated by the authorities cited by the Court:

"A Court of equity ought to do justice completely, and not by halves." Camp v. Boyd, 229 U.S. 530, 551, 33 S.Ct. 785, 793, 57 L.Ed. 1317 (1913). In Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946), the Court recognized that this principle has particular vigor "where federally protected rights have been invaded" and in such cases "Courts will be alert to adjust their remedies so as to grant the necessary relief." 330 F. Supp. at 1177.

<sup>98.</sup> Toyosaburo Korematsu v. United States, 323 U.S. 214, 222 (1944).

<sup>99.</sup> Solesbee v. Balkcom, 339 U.S. 9, 11 (1950).

In Porter v. Warner Holding Co., 328 U.S. 395, 66 S.Ct. 1086 (1946), the Supreme Court described the authority of a Court of equity:

It may act so as to adjust and reconcile competing claims and so as to afford full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the Court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. 328 U.S. at 398, 66 S.Ct. at 1089.

And, as was observed in *Alexander v. Hillman*, 296 U.S. 222, 239, 56 S.Ct. 204, 209-210 (1935):

The ancillary bill is not an original bill for the commencement of a suit, That it was not so intended is shown by the fact that process was not prayed or issued. While in form not inappropriate for commencement of suit, it was in fact formulated and filed to serve as a pleading in the main suit to put respondents to proof of their claims and to assert the right to affirmative relief. Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge, and promptly to enforce substantial rights of all parties before them.

The Court added: "That requirement is in harmony with the rule generally followed by Courts of equity that, having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief." 296 U.S. at 242, 56 S.Ct. at 211. Further, "One of the duties of such a court is to prevent a multiplicity of suits . . ." Camp v. Boyd, 229 U.S. 530, 552, 33 S.Ct. 785, 793 (1913).

The foregoing authorities clearly establish that the trial court had both the power and the duty in this case to render a complete decree which will fully and finally effectuate the intent of the Court's Memorandum Opinion. Furthermore, Appellees' (Plaintiffs') pleadings should be deemed as having been amended to conform to evidence relevant to issues tried by consent. The record of this case, relating to price advertising and trade or assumed name practice by optometrists, is voluminous. Every aspect of these activities known to Appellant and Appellees was explored at length in testimony and presented in great detail in trial briefs.

Fortunately for all, litigation in the federal courts is no longer a game of artful pleading. Rule 15(b) of the Federal Rules of Civil Procedure is in point and provides in pertinent part as follows:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

\* \* \*

The above rule frequently operates in tandem with Rule 54(c), which states in pertinent part:

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. (emphasis added).

The federal courts, and particularly the Fifth Circuit Court of Appeals, have had many occasions to apply Rules 15(b) and 54(c). The consistent ruling is that Rules 15(b) and 54(c) must be applied *liberally* unless the omission in pleading was due to bad faith, conscious indifference or other inexcusable conduct and unless the party opposing amendment can show some actual prejudice from the delay. See, e.g., Wallin v. Fuller, 5 Cir. 1973, 476 F.2d 1204; Longbottom v. Swaby, 5 Cir. 1968, 397 F.2d 45; Fey v. Walston & Co., Inc., 7 Cir. 1974, 493 F.2d 1036, 1050.

In this case it is submitted that the operative facts and controlling law are such that Appellants could not have suffered any prejudice from Appellees lack of pleading. If the facts show that optometrists are restrained by statute from exercising a right to advertise their prices to the public and from practicing under a trade or assumed name, and according to the law the restraint is void, then for all practical purposes the Appellants bear the same defense burden regardless whether the restriction is effected by one statute, two statutes or ten statutes. What conceivable additional proof could Appellants have adduced had Appellees pleaded additional sections of the

Texas Optometry Act? Appellants have not suggested any, and Appellees submit there is none.

Note that Rule 15(b), with respect to amendments to conform to the evidence, requires either express or implied consent to trial of issues upon which the evidence is relevant. In the Fifth Circuit the leading case in point is Wallin v. Fuller, supra, 476 F.2d 1204. There the suit, an Alabama diversity action, was pleaded on the theory or ordinary negligence. The pretrial order specified that the issues would be ordinary negligence and ordinary contributory negligence. At trial, however, plaintiff's attorney introduced portions of defendant's deposition which indicated that if plaintiff had been guilty of contributory negligence, defendant may have been guilty of subsequent negligence (similar to "last clear chance"). Defense counsel did not object; indeed, neither attorney drew the trial court's attention to the issues outside the pleadings and pretrial order until after both sides had rested. Plaintiff then requested leave to amend so as to get the issue of subsequent negligence before the jury on the ground that it was tried by consent. The trial court denied leave in reliance on the pretrial order. The jury found for defendant.

On apepal the Fifth Circuit reversed and remanded for a new trial, holding that Rule 16 on pretrial procedure must give way to a liberal application of Rule 15(b). The factors discussed by the Fifth Circuit directly fit the issues now before this Court:

Under the standards of Rule 15(b) the defendant impliedly consented to the trial of issues outside the pretrial order, and the pleadings should therefore

have been amended. A substantial quantity of evidence tending to establish subsequent negligent or wanton conduct was brought before the jury, through the deposition of Mayes and the testimony of Fuller, without objection by defense counsel. \* \* \* Having deposed Mayes well in advance of the trial, defense counsel cannot complain of having been unaware that the evidence might tend to establish subsequent negligence and wantonness. In these circumstances the failure of the defense to seek to limit the evidence during the trial in accordance with the pretrial order establishes consent to the trial of these issues. 476 F.2d at 1210 (emphasis added).

If anything, the instant case is stronger for a Rule 15(b) amendment than Wallin v. Fuller. Here no pretrial order was entered and Appellees made no stipulation as to the issues. Here most of the record is devoted to commercial optometric practice, not just a "substantial quantity." Here Appellants took not one, but two, inch-thick depositions of Dr. N. Jay Rogers. In sum, the Appellants' failure to object or seek any limiting order from the Court clearly outweighs appellees' failure to plead more specifically.

This is a proper instance for application of the familiar rule that, "Once an answer is filed, relief depends not on the matters within the precise issues of the pleadings from a technical standpoint, but by the evidence actually received." Williams v. United States, 405 F.2d 234 (5th Cir. 1968).

### CONCLUSION

The Judgment of the District Court is entirely correct with respect to the unconstitutionality of Texas statutory provisions that deny licensed optometrists and consumers the benefits of trade name communication. Any holding to the contrary would conflict directly with the essential reasoning of this Court's commercial advertising decisions. Furthermore, it would stand this reocrd on its head. The First Amendment interests implicated by a trade name possess indisputably substantial value for traders and consumers; a trade name is unmatched as an efficient medium of useful economic information; and, far from representing an unusual or somehow suspect variety of advertising, a trade name is a highly traditional form of legally-protected communication. The decision of the District Court is narrow—its limits are readily visible, the economic activity at the heart of this case-"commercial" optometry-is a perfectly legal activity in the State of Texas. Finally, the District Court's injunction and Orders Pendente Lite are thoroughly justified and ought not now be disturbed.

WHEREFORE, PREMISES CONSIDERED, Appellees respectfully move that this Court summarily affirm the District Court's Judgment as the contentions of Appellants are so unsubstantial as to warrant no further argument. In the alternative, Appellees urge the Court to take no action herein without the benefit of full argument and

plenary consideration of both appeals now pending on this Court's docket in consequence of the Judgment below.

Respectfully submitted,

ROBERT Q. KEITH BRIAN R. DAVIS VICTOR J. ROGERS, II ARTHUR R. ALMQUIST

By:	
-,-	Of Counsel

Of Counsel:

Mehaffy, Weber, Keith & Gonsoulin 1400 San Jacinto Building Beaumont, Texas 77701

Deleon & Davis 408 First Federal Plaza Austin, Texas 78701

VICTOR J. ROGERS, II 3434 One Allen Center Houston, Texas 77002

## CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing has been furnished to all interested parties this \_\_\_\_\_ day of March, 1978.

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ROBERT	Q.	KEITH	
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### APPENDIX A

Art. 4552-2.02. Definitions

As used in this Act:

(1) The "practice of optometry" is defined to be the employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer nor to prescribe any drug or physical treatment whatsoever, unless such optometrist is a regularly licensed physician or surgeon under the laws of this state. Nothing herein shall be construed to prevent selling ready-to-wear spectacles or eyegrasses as merchandise at retail, nor to prevent simple repair jobs.

## Art. 4552-2.10. Proceedings; subpoenas; oaths

The board, any committee, or any member thereof, shall have the power to issue subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of books, records and documents, to administer oaths and to take testimony concerning all matters within its or his jurisdiction. The board shall not be bound by strict rules of procedure or by the laws of evidence in the conduct of its proceedings but the determination shall be founded upon sufficient legal evidence to sustain it.

## Art. 4552-3.02. Application

- (a) The applicant shall make application, furnishing to the secretary of the board, on forms to be furnished by the board, satisfactory sworn evidence that he has attained the age of 21 years, is of good moral character, is a citizen of the United States, and has at least graduated from a first grade high school, or has a preliminary education equivalent to permit him to matriculate in The University of Texas, and that he has attended and graduated from a reputable university or college of optometry which meets with the requirements of the board, and such other information as the board may deem necessary for the enforcement of this Act.
- (b) A university or school of optometry is reputable whose entrance requirements and course of instruction are as high as those adopted by the better class of universities and schools of optometry and whose course of instruction shall be equivalent to not less than six terms of eight months each, and approved by the board. Provided, however, that the provisions of this subsection shall only apply to those students enrolling in school from and after the effective date of this Act.

## Art. 4552-3.05. Subjects of examination

The examination shall consist of written, oral or practical tests, in practical, theoretical, and physiological optics, in theoretical and practical optometry, and in the anatomy, physiology and pathology of the eye as applied to optometry and in such other subjects as may be regularly taught in all recognized standard optometric universities or schools.

## Art. 4552-4.01B Educational requirement for renewal

- (a) Each optometrist licensed in this state shall take annual courses of study in subjects relating to the utilization and application of scientific, technical, and clinical advances in vision care, vision therapy, visual training, and other subjects relating to the practice of optometry regularly taught by recognized optometric universities and schools.
- (b) The length of study required is 12 hours per calendar year.
- (c) The continuing education requirements established by this section shall be fulfilled by attendance in continuing education courses sponsored by an accredited college of optometry or in a course approved by the board. Attendance at a course of study shall be certified to the board on a form provided by the board and shall be submitted by each licensed optometrist in conjunction with his application for renewal of his license and submission of renewal fee.
- (d) The board may take action necessary in order to qualify for funds or grants made available by the United States or an agency of the United States for the establishment and maintenance of programs of continuing education.
- (e) Licensees who have not complied with the requirement of this section may not be issued a renewal license, except for the following persons who are exempt:
- (1) a person who holds a Texas license but who does not practice optometry in Texas;

- (2) a licensee who served in the regular armed forces of the United States during part of the 12 months immediately preceding the annual license renewal date;
- (3) a licensee who submits proof that he suffered a serious or disabling illness or physical disability which prevented him from complying with the requirements of this section during the 12 months immediately preceding the annual license renewal date; or
- (4) a licensee first licensed within the 12 months immediately preceding the annual renewal date.

## Art. 4552-4.04. Revocation, suspension, etc.

- (a) The board may, in its discretion, refuse to issue a license to any applicant and may cancel, revoke or suspend the operation of any license if it finds that:
- (1) the applicant or licensee is guilty of gross immorality;
- (2) the applicant or licensee is guilty of any fraud, deceit, dishonesty, or misrepresentation in the practice of optometry or in his seeking admission to such practice;
- (3 the applicant or licensee is unfit or incompetent by reason of negligence;
- (4) the applicant or licensee has been convicted of a felony or a misdemeanor which involves moral turpitude;
- (5) the applicant or licensee is an habitual drunkard or is addicted to the use of morphine, cocaine or other drugs having similar effect or has become insane or has been adjudged by a court of competent jurisdiction to be of unsound mind;

- (6) the licensee has directly or indirectly employed, hired, procured, or induced a person, not licensed to practice optometry in this state, to so practice;
- (7) the licensee directly or indirectly aids or abets in the practice of optometry any person not duly licensed to practice under this Act;
- (8) the licensee directly or indirectly employs solicitors, canvassers or agents for the purpose of obtaining patronage;
- (9) the licensee lends, leases, rents or in any other manner places his license at the disposal or in the service of any person not licensed to practice optometry in this state;
- (10) the applicant or licensee has willfully or repeatedly violated any of the provisions of this Act;
- (11) the licensee has willfully or repeatedly represented to the public or any member thereof that he is authorized or competent to cure or treat diseases of the eye;
- (12) the licensee has his right to practice optometry suspended or revoked by any federal agency for a cause which in the opinion of the board warrants such action;
- (13) the applicant or licensee has been finally convicted of violation of Article 773 of the Penal Code.<sup>1</sup>
- (b) Proceedings under this section shall be begun by filing charges with the board in writing and under oath. Said charges may be made by any person or persons. The chairman of the board shall fix a time and place for a hearing and shall cause a copy of the charges, together

with a notice of the time and place fixed for the hearing, to be served on the respondent or his counsel at least 10 days prior thereto. When personal service cannot be effected, the board shall cause to be published once a week for two successive weeks a notice of the hearing in a newspaper published in the county wherein the respondent was last known to practice, and shall mail a copy of the charges and of such notice to the respondent at his last known address. When publication of the notice is necessary, the date of hearing shall not be less than 10 days after the last date of the publication of the notice.

- (c) At said hearing the respondent shall have the right to appear either personally or by counsel, or both, to produce witnesses and evidence on his behalf, to cross examine witnesses and to have subpoenas issued by the board. The board shall thereupon determine the charges upon their merits.
- (d) Any person whose license to practice optometry has been refused or has been revoked or suspended by the board may, within 20 days after the making and entering of such order, take an appeal to any of the district courts of the county of his residence, but the decision of the board shall not be stayed or enjoined except upon application to such district court after notice to the board.
- (e) Upon application, the board may reissue a license to practice optometry to a person whose license has been revoked but such application shall not be made prior to one year after the revocation and shall be made in such manner and form as the board may require.
- (f) Nothing in this Act shall be construed to prevent the administrator or executor of the estate of a deceased

optometrist from employing a licensed optometrist to carry on the practice of such deceased during the administration of such estate nor to prevent a licensed optometrist from working for such person during the administration of the estate when the legal representative thereof has been authorized by the county judge to continue the operation of such practice.

## Art. 4552-5.01. Display of license

Every person practicing optometry in this state shall display his license or certificate in a conspicuous place in the principal office where he practices optometry and whenever required, exhibit such license or certificate to said board, or its authorized representative, and whenever practicing said profession of optometry outside of, or away from said office or place of business, he shall deliver to each person fitted with glasses a bill, which shall contain his signature, post-office address, and number of his license or certificate, together with a specification of the lenses and material furnished and the prices charged for the same respectively.

# Art. 4552-5.04. Practice without license; fraud; house-to-house

It shall be unlawful for any person to:

- (1) falsely impersonate any person duly licensed as an optometrist under the provisions of this Act or to falsely assume another name;
- (2) buy, sell, or fraudulently obtain any optometry diploma, license, record of registration or aid or abet therein;

- (3) practice, offer, or hold himself out as authorized to practice optometry or use in connection with his name any designation tending to imply that he is a practitioner of optometry if not licensed to practice under the provisions of this Act;
- (4) practice optometry during the time his license shall be suspended or revoked;
- (5) practice optometry from house-to-house or on the streets or highways, notwithstanding any laws for the licensing of peddlers. This shall not be construed as prohibiting an optometrist or physician from attending, prescribing for and furnishing spectacles, eyeglasses or ophthalmic lenses to a person who is confined to his abode by reason of illness or physical or mental infirmity, or in response to an unsolicited request or call, for such professional services.

## Art. 4552-5.05. Treating diseased eyes

Anyone practicing optometry who shall prescribe for or fit lenses for any diseased condition of the eye, or for the disease of any other organ of the body that manifests itself in the eye, shall be deemed to be practicing medicine within the meaning of that term as defined by law. Any such person possessing no license to practice medicine who shall so prescribe or fit lenses shall be punished in the same manner as is prescribed for the practice of medicine without a license.

## Art. 4552-5.06. Spectacles as premiums

It shall be unlawful for any person in this state to give, or cause to be given, deliver, or cause to be delivered,

in any manner whatsoever, any spectacles or eyeglasses, separate or together, as a prize or premium, or as an inducement to sell any book, paper, magazine or any work of literature or art, or any item of merchandise whatsoever.

## Art. 4552-5.07. Prescribing without examination

No licensed optometrist shall sign, or cause to be signed, a prescription for an ophthalmic lens without first making a personal examination of the eyes of the person for whom the prescription is made.

## Art. 4552-5.11. Window displays and signs

- (a) It shall be unlawful for any optometrist:
- (1) to display or cause to be displayed any spectacles, eyeglasses, frames or mountings, goggles, lenses, prisms, contact lenses, eyeglass cases, ophthalmic material of any kind, optometric instruments, or optical tools or machinery, or any merchandise or advertising of a commercial nature in his office windows or reception rooms;
- (2) to make use of or permit the continuance of any colored or neon lights, eyeglasses or eye signs, whether painted, neon, decalcomania, or any other either in the form of eyes or structures resembling eyes, eyeglass frames, eyeglasses or spectacles, whether lighted or not, or any other kind of signs or displays of a commercial nature in \* \* \*

## Art. 4552-5.12. Basic competence

(a) In order to insure an adequate examination of a patient for whom an optometrist signs or causes to be

signed a prescription for an opthalmic lens, in the initial examination of the patient the optometrist shall make and record, if possible, the following findings of the condition of the patient:

- (1) Case History (ocular, physical, occupational and other pertinent information).
- (2) Far point acuity, O.D., O.S., O.U., unaided; with old glasses, if available, and with new glasses, if any.
  - (3) External examination (lids, cornea, sclera, etc.).
- (4) Internal ophthalmoscopic examination (media, fundus, etc.).
  - (5) Static retinoscopy, O.D., O.S.
  - (6) Subjective findings, far point and near point.
- (7) Phorias or ductions, far and near, lateral and vertical.
  - (8) Amplitude or range of accommodation.
  - (9) Amplitude or range of convergence.
  - (10) Angle of vision, to right and to left.
- (b) Every prescription for an ophthalmic lens shall include the following information: interpupillary distance, far and near; lens prescription, right and left; color or tint; segment type, size and position; the optometrist's signature.
- (c) The willful or repeated failure or refusal of an optometrist to comply with any of the foregoing requirements shall be considered by the board to constitute prima facie evidence that he is unfit or incompetent by reason of negligence within the meaning of Section 4.04

(a) (3) of this Act,<sup>1</sup> and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instances in which it is alleged that the rule was not complied with. At a hearing pursuant to the filing of such charges, the person charged shall have the burden of establishing that compliance with the rule in each instance in which proof is adduced that it was not complied with was not necessary to a proper examination of the patient in that particular case.

## Art. 4552-5.13. Professional responsibility

- (a) The provisions of this section are adopted in order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship.
- (b) No optometrist shall divide, share, split, or allocate, either directly or indirectly, any fee for optometric services or materials with any lay person, firm or corporation, provided that this rule shall not be interpreted to prevent an optometrist from paying an employee in the regular course of employment, and provided further, that it shall not be construed as a violation of this Act for any optometrist to lease space from an establishment on a percentage or gross receipts basis or to sell, transfer or assign accounts receivable.
- (c) No optometrist shall divide, share, split or allocate, either directly or indirectly, any fee for optometric services or materials with another optometrist or with a physician except upon a division of service or responsibility provided that this rule shall not be interpreted to prevent partnerships for the practice of optometry. This

Act does not prohibit an optometrist from being employed on a salary, with or without bonus arrangements, by a licensed optometrist or physician, regardless of the amount of supervision exerted by the employing optometrist or physician over the office in which the employed optometrist works, provided such bonus arrangements, if any, shall not be based in whole or in part on the business or income of any optical company.

- (d) No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed. In event of the death or retirement of a partner, the surviving partner or partners practicing optometry in a partnership name may, with the written permission of the retiring partner or the deceased optometrist's widow or other legal representative, as the case may be, continue to practice with the name of the deceased partner in the partnership name for a period not to exceed one year from the date of his death, or during the period of administration of a deceased partner's estate as provided by Section 4.04(f) of this Act,1 whichever period shall be longer.
- (e) No optometrist shall use, cause or allow to be used, his name or professional identification, as authorized

- by Article 4590e, as amended, Revised Civil Statutes of Texas, on or about the door, window, wall, directory, or any sign or listing whatsoever, of any office, location or place where optometry is practiced, unless said optometrist is actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.
- (f) No optometrist shall practice or continue to practice optometry in any office, location or place of practice where any name, names or professional identification on or about the door, window, wall, directory, or any sign or listing whatsoever, or in any manner used in connection therewith, shall indicate or tend to indicate that such office, location or place of practice is owned, operated, supervised, staffed, directed or attended by any person not actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.
- (g) The requirement of Subsections (e) and (f) of this section that an optometrist be "actually present" in an office, location or place of practice holding his name out to the public shall be deemed satisfied if the optometrist is, as to such office, location or place of practice, either:
- (1) physically present therein more than half the total number of hours such office, location, or place of practice is open to the public for the practice of optometry during each calendar month for at least nine months in each calender year; or
- (2) physically present in such office, location, or place of practice for at least one-half of the time such person conducts, directs, or supervises any practice of optometry.

- (h) Nothing in this section shall be interpreted as requiring the physical presence of a person who is ill, injured, or otherwise incapacitated temporarily.
- (i) The requirement of Subsections (e) and (f) of this section that an optometrist be "practicing optometry" at an office, location, or place of practice hoding his name out to the public shall be deemed satisfied if the optometrist regularly makes personal examination at such office, location, or place of practice of the eyes of some of the persons prescribed for therein or regularly supervises or directs in person at such office location or place of practice such examintaions.
- (j) The willful or repeated failure or refusal of an optometrist to comply with any of the previsions of this section shall be considered by the board to constitute prima facie evidence that such optometrist is guilty of violation of this Act, and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instance or instances in which it is alleged that the rule was not complied with. Alternatively, or in addition to the above, it shall be the duty of the board to institute and prosecute an action in a court of competent jurisdiction to restrain or enjoin the violation of any of the preceding rules.

## Art. 4552-5.14. Lease of premises from mercantile establishment

(a) In order to safeguard the visual welfare of the public and the optometrist-patient relationship, fix professional responsibility, establish standards of professional surroundings, more nearly secure to the patient the optometrist's undivided loyalty and service, and carry out

- the prohibitions of this Act against placing an optometric license in the service or at the disposal of unlicensed persons, the provisions of this section are applicable to any optometrist who leases space from and practices optometry on the premises of a mercantile establishment.
- (b) The practice must be owned by a Texas-licensed optometrist. Every phase of the practice and the leased premises shall be under the exclusive control of a Texas-licensed optometrist.
- (c) The prescription files and all business records of the practice shall be the sole property of the optometrist and free from involvement with the mercantile establishment or any unlicensed person. Except, however, that those business records essential to the successful initiation or continuation of a percentage of gross receipts lease of space may be inspected by the applicable lessor.
- (d) The leased space shall be definite and apart from the space occupied by other occupants of the premises. It shall be separated from space used by other occupants of the premises by solid, opaque partitions or walls from floor to ceiling. Railings, curtains, and other similar arrangements are not sufficient to comply with this requirement.
- (e) The leased space shall have a patient's entrance opening on a public street, hall, lobby, corridor, or other public thoroughfare. The aisle of a mercantile establishment does not comply with this requirement. An entrance to the leased space is not a patient's entrance within the meaning of this subsection unless actually used as an entrance by the optometrist's patients.
- (f) No phase of the optometrist's practice shall be conducted as a department or concession of the mer-

cantile establishment; and there shall be no legends or signs such as "Optical Department," "Optometrical Department," or others of similar import, displayed on any part of the premises or in any advertising.

- (g) The optometrist shall not permit his name or his practice to be directly or indirectly used in connection with the mercantile establishment in any advertising, displays, signs, or in any other manner.
- (h) All credit accounts for patients shall be established with the optometrist and not the credit department of the mercantile establishment. However, nothing in this subsection prevents the optometrist from thereafter selling, transferring, or assigning any such account.
- (i) Any optometrist practicing optometry on or after April 15, 1969, in a manner, or under conditions, contrary to any of the provisions of this Section 5.14 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.14 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease expiring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

## Art. 4552-5.15. Relationships with dispensing opticians

(a) The purpose of this section is to insure that the practice of optometry shall be carried out in such a manner that it is completely and totally separated from the business of any dispensing optician, with no control of

one by the other and no solicitation for one by the other, except as hereinafter set forth.

- (b) If an optometrist occupies space for the practice of optometry in a building or premises in which any person, firm, or corporation engages in the business of a dispensing optician, the space occupied by the optometrist shall be separated from the space occupied by the dispensing optician by solid partitions or walls from floor to ceiling. The space occupied by the optometrist shall have a patient's entrance opening on a public street, hall, lobby, corridor, or other public thoroughfare. An entrance is not a patient's entrance within the meaning of this subsection unless actually used as an entrance by the optometrist's patients.
- (c) An optometrist may engage in the business of a dispensing optician, own stock in a corporation engaged in the business of a dispensing optician, or be a partner in a firm engaged in the business of a dispensing optician, but the books, records, and accounts of the firm or corporation must be kept separate and distinct from the books, records, and accounts of the practice of the optometrist.
- (d) No person, firm, or corporation engaged in the business of a dispensing optician, other than a licensed optometrist or physician, shall have, own, or acquire any interest in the practice, books, records, files, equipment, or materials of a licensed optometrist, or have, own, or acquire any interest in the premises or space occupied by a licensed optometrist for the practice of optometry other than a lease for a specific term without retention of the present right of occupancy on the part of the dispensing optician. In the event an optometrist or physician who

is also engaged in the business of a dispensing optician (whether as an individual, firm, or corporation) does own an interest in the practice, books, records, files, equipment or materials of another licensed optometrist, he shall maintain a completely separate set of books, records, files, and accounts in connection therewith. Any optometrist practicing optometry on or after April 15, 1969 in a manner, or under conditions, contrary to any of the provisions of this Section 5.15 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.15 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease expiring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

(e) If, after examining a patient, an optometrist believes that lenses are required to correct or remedy any defect or abnormal condition of vision, the optometrist shall so inform the patient and shall expressly state that the patient has two alternatives for the preparation of the lenses according to the optometrist's prescription: First, that the optometrist will prepare or have the lenses prepared according to the prescription; and second, that the patient may have the prescription filled by any dispensing optician (not naming or suggesting any particular dispensing optician) but should return for an optometrical examination of the lenses. If the patient chooses the first alternative, the optometrist may refer the patient to a particular dispensing optician for selection of frames and filling the prescription.

(f) If any person, on visiting the premises of any dispensing optician without presenting a prescription written by a licensed physician or optometrist, makes any inquiry or request concerning an examination or the obtaining of any ophthalmic materials or services requiring such a prescription, then the optician or his agent or employee may not respond in any manner except to state in effect that the optician cannot examine the patient or prescribe or fit glasses or lenses, but that the patient seeking such service must go to a licensed physician or optometrist. If there is no further inquiry from the prospective patient, the optician or his agent or employee may not make any further statement of any kind. If, however, the prospective patient makes an inquiry as to where or to whom he may go to obtain such service, the optician or his agent or employee shall give the prospective patient the names and addresses of at least three persons, each of whom is either a licensed ophthalmologist or a licensed optometrist whose practice is located within a radius of five miles from the optician's place of business, or if there are fewer than three of these, the name and address of each licensed ophthalmologist or licensed optometrist whose practice is so located.

#### APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

CIVIL ACTION NO. B-75-277-CA

DR. N. JAY ROGERS

V.

DR. E. RICHARD FRIEDMAN, ET AL

#### ORDER PENDENTE LITE

Section 5.13(d) of the Texas Optometry Act, which prohibits an optometrist from practicing under a name other than the name under which he is licensed, is the subject of a direct constitutional attack in this case.

Plaintiff's office at 907 Congress Avenue, Austin, Texas, becomes subject to the prohibition of § 5.13(d) during the pendency of this suit. To avoid the substantial irrevocable expense and disruption attendant to converting such office so as to conform to the mandate of § 5.13 (d), it is accordingly

ORDERED that the office of Texas State Optical at 907 Congress Avenue, Austin, Texas, is hereby declared exempt from the prohibitions of § 5.13(d) and like "trade name" prohibitions of the Texas Optometry Act until

60 days after a final judgment is rendered by this court herein, or pending further order of the Court.

DONE this 16th day of February, 1976.

/s/ JOE J. FISHER
United States District Judge

APPROVED AS TO FORM AND SUBSTANCE:

/s/ ROBERT Q. KEITH Robert Q. Keith Attorney for Plaintiff

/s/ ROBERT L. OLIVER Robert L. Oliver Attorney for Defendant

> Civ. Order Book Vol. 172, Page 243

FILED
JUN 21 1978

MICHAEL RODAK, JR., CLERK

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1977

NO. 77-1163
E. RICHARD FRIEDMAN, O.D., et al
Appellants

V. N. J. ROGERS, O.D., et al

Appellees

NO. 77-1164 N. J. ROGERS, O.D., et al

**Appellants** 

V.
E. RICHARD FRIEDMAN, O.D., et al
Appellees

NO. 77-1186
TEXAS OPTOMETRIC ASSOCIATION,
INC., et al

Appellants

V. N. J. ROGERS, O.D., et al

Appellees

Consolidated Appeals From The United States District Court For the Eastern District of Texas Beaumont Division

BRIEF OF APPELLANT,
TEXAS OPTOMETRIC ASSOCIATION, INC.,
IN SUPPORT OF THE CONSTITUTIONALITY OF
THE TEXAS OPTOMETRY ASSUMED NAME STATUTE

LARRY NIEMANN FRED NIEMANN, JR. Niemann & Niemann 1210 American Bank Tower Austin, Texas 78701

Attorneys for Appellant, Texas Optometric Association, Inc.

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## IN THE SUPREME COURT OF THE UNITED STATES

NO. 77-1163 E. RICHARD FRIEDMAN, O.D., et al Appellants

Appellar

N. J. ROGERS, O.D., et al

Appellees

NO. 77-1164 N. J. ROGERS, O.D., et al

Appellants

V. E. RICHARD FRIEDMAN, O.D., et al Appellees

NO. 77-1186 TEXAS OPTOMETRIC ASSOCIATION, INC., et al

Appellants

N. J. ROGERS, O.D., et al

Appellees

BRIEF OF APPELLANT, TEXAS OPTOMETRIC ASSOCIATION, INC., IN SUPPORT OF THE CONSTITUTIONALITY OF THE TEXAS OPTOMETRY ASSUMED NAME STATUTE

## **Opinion Below**

The opinion of the District Court for the Eastern District of Texas, Beaumont Division, entered on September 12, 1977, is reported at 438 F. Supp. 428. A copy of that opinion may be found in the Jurisdictional Statement filed by the Attorney General of Texas.

#### Jurisdiction

This suit was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331, 1343, 2201, 2281, and 2284 in the United States District Court for the Eastern Division of Texas, to enjoin as unconstitutional the enforcement of Sections 2.02, 5.09(a), 5.13(d) and 5.15(e) of the Texas Optometry Act. A three-judge district court was convened to hear this cause as was then required by 28 U.S.C. §2281 and 2284. The final judgment of the court was entered on October 27, 1977, declaring a portion of §5.09(a) and §5.13(d) unconstitutional, and declaring §2.02 and 5.15(e) constitutional. Notice of appeal was filed in the court below by the Texas Optometric Association, Inc. on December 22, 1977, by the State of Texas on December 20, 1977, and by Dr. Rogers, et al, on December 21, 1977. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253 and §2101(b). This Court noted probable jurisdiction in this case and consolidated the three separate appeals on April 17, 1978.

## **Question Presented**

Whether a state statute prohibiting the practice of optometry under an assumed name is unconstitutional as an unwarranted infringement of First Amendment Freedom of Speech.

#### Statute Involved

The portion of Section 5.13 (d) of the Texas Optometry Act that the District Court held unconstitutional reads as follows:

"No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas. . . ."

#### Statement of the Case

In 1959 the Texas State Board of Examiners in Optometry adopted what was known as "The Professional Responsibility Rule." This rule provided, in part, that the practice of optometry under an assumed name was prohibited. In 1969, the Texas Legislature enacted the comprehensive Texas Optometry Act (Art. 4552, Texas Revised Civil Stat. Ann.) which codified into statute what had previously been the Optometry Board's Professional Responsibility Rule. Section 5.13(d) of the Act prohibits optometrists from practicing under an assumed name, corporate name, trade name, or any other name other than the name under which he is licensed to practice optometry in Texas.

On August 25, 1975, the Appellant, Dr. Rogers, who is a member of the Texas Optometry Board, brought this case against the remaining five members of the Texas Optometry Board. In his suit, Dr. Rogers challenged Section 5.13(d) (the prohibition of assumed name practice), Section 5.09(a) (prohibition of price advertising by optometrists), Section 2.02 (makeup of the Optometry Board) and various other sections of the Texas Optometry Act as being unconstitutional, and he sought to enjoin their enforcement. Section 5.13(d), which is the statute at issue in this appeal, was challenged as being an infringement upon Dr. Rogers' first amendment

rights to commercial free speech. A three judge court was convened to consider the case.

On June 11, 1976, W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas, Chapter intervened and asserted that Section 5.13(d) violated Senior Citizens' first amendment rights. Mr. Dickinson and his associates will hereinafter be referred to as "Senior Citizens."

On September 13, 1976, the Texas Optometric Association, Inc., intervened in support of the Texas Optometry Board members and supported the constitutionality of Section 5.13(d), Section 2.02, and the other challenged provisions of the Texas Optometry Act.

On October 27, 1977, the three-judge court below entered its final judgment, ruling that §5.09(a) (the prohibition of price advertising) and §5.13(d) (the assumed name ban) were unconstitutional under the First Amendment, and that §2.02 (the board make-up provision) was constitutional. Neither party has chosen to appeal the lower court's ruling concerning price advertising. However, Dr. Rogers and Senior Citizens have appealed the lower court's ruling that §2.02 (board make-up) was constitutional. The Texas Optometric Association, Inc., and the members of the Texas Optometric Board have appealed the lower court's decision that §5.13(d) (the assumed name prohibition) is unconstitutional.

## **Summary of Argument**

Section 5.13(d) of the Texas Optometry Act prohibits optometrists from practicing under an assumed name. It requires that an optometrist practice under the name in which he has been licensed with the Texas Optometry Board. The court below incorrectly determined that this

statute was unconstitutional as an infringement upon commerical free speech under the First Amendment.

This case differs from previous commercial speech balancing test cases in several significant ways. First, under current Texas law, optometrists may freely advertise. Section 5.13(d) does not affect an optometrist's right to advertise information as to price, availability of service, quality of service, or any other valuable commercial message. Secondly, Section 5.13(d) prohibits the use of assumed names, a form of commercial speech which is inherently misleading to one degree or another. Previous commercial speech cases have indicated that false or deceptive speech is not protected by the First Amendment. If the speech regulated by Section 5.13(d) is not protected by the First Amendment, then there is no need to go further and apply a balancing test analysis.

However, if a balancing test analysis is appropriate, Section 5.13(d) is constitutional under such an analysis. Under the First Amendment balancing test, the State's interests in enacting a commercial speech regulation are balanced with various First Amendment interests.

#### State Interests

The State has several interests in enacting Section 5.13(d):

(1) Response to past abuse. At one time optometrists were permitted to practice under trade names and assumed names; and during that time abuses were rampant. The Texas Legislature, viewing these abuses and hoping to protect the public from them, enacted Section 5.13(d).

- (2) Fixing professional responsibility. By requiring an optometrist to practice under his own name, the State is better enabling the public to determine who is professionally responsible for the vision care services rendered. The State is attempting to insure that the identity of the individual optometrist is known upfront so that he will be more fully accountable to the patient.
- (3) Prevention of abandonment of bad reputation. Since assumed names may easily be changed, an assumed-name optometrist who has developed a reputation for incompetence may easily abandon that bad reputation by assuming a new assumed name. Once he takes a new assumed name, none but the very sophisticated consumer will be aware that his practice is in fact the same practice that earned the bad reputation. And once the reputation for incompetence resurfaces, it can be abandoned again by assuming yet another name. The State has an interest in insuring that an optometrist practice only under the name in which he is licensed so that an optometrist may not change his trade name to abandon a previous reputation.
- (4) Enhancing the doctor-patient relationship. Experience has shown that under an assumed name practice, patients often never learn the identity of the attending optometrist. This anonymity of the doctor discourages a close personal doctor-patient relationship and discourages a continuing professional relationship between doctor and patient.
- (5) Enhancing the likelihood of quality vision care. Accountability tends to breed quality, while anonymity and lack of accountability tend to breed indifference.

Section 5.13(d) places the emphasis on the optometrist's personal accountability and responsibility for a patient's vision care. It places an emphasis on the doctor as an individual who is personally responsible, rather than on his role as an employee or associate of an anonymous and impersonal trade name organization. Furthermore it makes the doctor more accountable by emphasizing the permanent effect which incompetent work is likely to have on his personal, permanent reputation. The visibility and accountability increase the likelihood that the doctor will do his best in attending a patient. The increased accountability and the humanized doctor-patient relationship naturally increase the likelihood that quality vision care will be provided.

(6) Increased public access to valuable consumer information. When an optometrist practices under his own name, the public is immediately informed of the identity of the responsible optometrist, the name under which he is licensed with the State of Texas, and the name under which that optometrist's personal reputation is associated. None of this information is conveyed by an assumed name. Furthermore the consumer is made aware of this information automatically, without the necessity of making the effort to pierce a trade name veil of identity. Also, this information is made available to the patient at the beginning of the patient's quest for vision care, at the very time such information is most valuable to the "comparison shopper" patient. Section 5.13(d) serves the interests of the State by insuring the public early and easy access to valuable consumer information.

#### First Amendment Interests

Under the balancing test the State interests are balanced with the various First Amendment interests. These First Amendment interests are (1) the seller's interest in disseminating commercial information, (2) the consumer's interest in receiving valuable commercial information, and (3) society's interest in a free flow of commercial information. Unlike many of the commercial speech cases previously heard by this Court, the statute in question in this case does not significantly impair any of these interests. In fact, the interests are actually enhanced by Section 5.13(d).

- (1) The Seller's interest in disseminating commercial information. The seller's interest in disseminating commercial information is not impaired by Section 5.13(d). No commercial message is stifled since there is no information conveyed by an assumed name which may not otherwise be conveyed by his true name or by advertising. No media is stifled since Section 5.13(d) does not affect the ability of an optometrist who practices under his own name from conveying commercial information via newspapers, television, or whatever other media he wishes. At most, Section 5.13(d) restricts the form of wording a message may take, insuring that it is more informative and less misleading.
- (2) The consumer's interest in receiving valuable commercial information. Section 5.13(d) actually insures that more information is provided to the public. More information as to personal reputation, identity, accountability and licensing are conveyed by the true name of an optometrist. This valuable information is not conveyed

by an assumed name. The requirement that an optometrist not use a fictitious or assumed name does not deprive the consumer of any valuable information. Also, such information is provided to the consumer without further effort on the part of the consumer and is provided early, at a time when such information is most valuable.

(3) Society's interest in a free flow of commercial information. Again, Section 5.13(d) does not prevent any valuable information from being exchanged. Instead it increases the flow by requiring more information to be disclosed than might otherwise be disseminated. It insures that such information is made more available at the very initial stages of a search for vision care. Consequently, Section 5.13(d) actually enhances the free flow of commercial information.

On balance, Section 5.13(d) promotes several valuable State interests, yet does not significantly impair traditional First Amendment commercial free speech interests. In fact, the First Amendment interests are enhanced by Section 5.13(d). The State interests and First Amendment interests overwhelmingly tilt the balance in favor of the constitutionality of Section 5.13(d).

Although the concept of "freedom of commercial speech" is just now emerging, this Court has made it clear that commercial speech is not afforded the same degree of protection as non-commercial speech. Because of the peculiar hardiness of commercial speech, regulations to insure truthfulness, to prevent deception, and to better inform the public will be permitted in the commercial speech area. Section 5.13(d) is designed to protect and better inform the public. As such, it is constitutional.

### Argument

### Introduction

Section 5.13(d) of the Texas Optometry Act provides: "No optometrist shall practice . . . optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas . . ." Art. 4552, Tex.Civ. Stat.Ann.

The court below held that §5.13(d) is unconstitutional under the First Amendment of the United States, relying extensively on *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) [hereinafter called *Bates*] and *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976) [hereinafter called *Virginia Pharmacy*].

The lower court reasoned that the Bates and Virginia Pharmacy advertising cases had strengthened the concept of commercial free speech to the point that they were controlling on the issue of the constitutionality of §5.13(d). Although the court recognized that the First Amendment balancing test should be applied to §5.13(d), the court did not seriously analyze the state's interests or the various First Amendment interests involved in §5.13(d). Instead, the court seemed to defer to the advertising cases as being determinative of the outcome of the balancing test in this case.

The lower court incorrectly interpreted *Bates* and *Virginia Pharmacy*. Although these cases do provide a framework for analysis of the constitutionality of §5.13(d), they are not directly controlling. When the

balancing test of *Bates* and *Virginia Pharmacy* is properly applied to §5.13(d), it becomes clear that §5.13(d) validly promotes valuable state interests with a minimum of infringement of First Amendment interests. In fact, certain First Amendment interests such as the consumers interest in receiving valuable information, and society's interest in a free flow of commercial information, are actually enhanced by §5.13(d). Section 5.13(d) is therefore constitutional under the First Amendment balancing test.

## THIS CASE DOES NOT RAISE THE FIRST AMENDMENT QUESTIONS RAISED IN THE BATES AND VIRGINIA PHARMACY CASES.

Although the court below relied heavily on *Bates* and *Virginia Pharmacy* in determining that Section 5.13(d) was unconstitutional, Section 5.13(d) raises substantially different questions than were raised under either *Bates* or *Virginia Pharmacy*. Those cases dealt with statutes which prohibited truthful, non-misleading information from being communicated via advertising. Section 5.13(d) differs from the statutes in *Bates* and *Virginia Pharmacy* in that (1) it does not prohibit or even regulate advertising in any way, and (2) it prevents the use of fictitious or assumed names which the legislature was justified in considering as false and misleading.

## A. This is not an advertising case.

Section 5.13(d) of the Texas Optometry Act prohibits optometrists from practicing optometry under a fictitious or assumed name. It requires that an optometrist practice under the name in "which he is licensed to practice optometry in Texas." Section 5.13(d) does not speak to whether an optometrist may advertise; and any effect §5.13(d) might have on advertising is purely incidental.

Under Texas law an optometrist may advertise. The primary restrictions on advertising by optometrists were those of §5.09 of the optometry act, which prohibited price advertising and which prohibited fraudulent, deceitful or misleading advertising. In the court below, that portion of §5.09 which prohibited price advertising was declared unconstitutional. No appeal has been taken on that matter and the constitutionality of §5.09 is not now before this Court. As the law now stands, an optometrist may advertise the availability of his services, the price of his services, and the quality of his services, so long as such advertising is not misleading. Therefore, this case does not present the question of whether the state may prohibit advertising by optometrists.

Similarly, this case does not raise the question of whether the State may prohibit advertising of assumed names used by optometrists. If this Court holds §5.13(d) is unconstitutional, then optometrists may use assumed names and may advertise using those names. If §5.13(d) is upheld, then optometrists must practice in their own name, and it would be illegal for them to practice under an assumed name. The only effect on advertising would be the incidental inability to advertise an illegal activity. As this Court has recognized before, where an activity is itself prohibited, no First Amendment question is raised by the incidental restriction on advertising of that activity. Pittsburg Press Co. v. Pittsburg Commission on Human Relations, 413 U.S. 376, 389 (1973). Bates at 384.

B. Section 5.13(d) prohibits the use of assumed or fictitious names, which are by definition misleading.

Unlike Bates and Virginia Pharmacy, this case deals with regulation of a type of commercial speech which is

by definition false and misleading. Whereas, *Bates* and *Virginia Pharmacy* dealt with statutes which prohibited the dissemination of truthful and non-misleading information, §5.13(d) deals only with the use of assumed names which are intended to mask the true identity of a practicing optometrist.

C. Unlike Bates, the commercial speech regulated by §5.13(d) is not protected by the First Amendment.

In Bates, Virginia Pharmacy, and Bigelow v. Virginia. 421 U.S. 809 (1975), [hereinafter called Bigelow], this Court has recognized that some First Amendment protections are to be afforded to commercial speech. In Bates, this Court held that the First Amendment does prohibit unwarranted restrictions of truthful, nondeceptive commercial speech. But, the exact extent to which false or misleading commercial speech is protected by the First Amendment has not yet been decided. This Court noted in Virginia Pharmacy that "untruthful speech, commercial or otherwise, has never been protected for its own sake". Virginia Pharmacy at 771. And "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena". Bates at 383. In the light of these pronouncements by this Court, commercial speech which is false or deceptive is not strictly protected by the First Amendment.

Once commercial speech is determined to be false or misleading, it no longer enjoys the protections afforded by the First Amendment and the Court need not invoke a lengthy and complicated balancing test analysis to determine if a regulation is permissible. In the case at bar, the speech being regulated is speech which is by definition fictitious and which masks an optometrist's true identity. The use of a fictitious or assumed name is not protected by the First Amendment since such use is to one degree or another misleading. It is enough to determine that the speech regulated by §5.13(d) is inherently false or misleading and therefore not entitled to First Amendment protection.

In summary, Bates and Virginia Pharmacy are not controlling in the case at bar. This case does not involve advertising. It does not prohibit the dissemination of truthful or non-misleading information; and, unlike Bates and Virginia Pharmacy, it involves the regulation of speech which is inherently deceptive to some degree and is therefore not afforded First Amendment protection.

# II. IF THE FIRST AMENDMENT DOES APPLY, SECTION 5.13(d) IS CONSTITUTIONAL UNDER THE BALANCING TEST.

If this Court concludes that the First Amendment threshold has been reached and that the balancing test rationale must be applied, we submit that the test has been met in our case.

In Bates and Virginia Pharmacy, this Court balanced the free speech interests of individuals and society with the various interests of the state in enacting the regulations. After balancing these various interests, this Court determined that the regulations in question were unconstitutional. Assuming that this same balancing test is to be applied to restrictions on false or misleading speech, then §5.13(d) of the Texas Optometry Act must be analyzed in the light of the various interests which are enhanced or impeded by that regulation. Under such a First Amendment balancing test analysis, §5.13(d) is clearly constitutional.

## A. Important state interests are promoted by §5.13(d).

In analyzing §5.13(d) under a balancing test analysis, it is necessary to first look at the various state interests and purposes served by that regulation. The starting point for the analysis is the stated purpose behind the statute. The statute provides:

"The provisions of this section are adopted in order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship." §5.13(a)

The language of the statute spells out the public interests which are sought to be protected: (1) Protection of the public from abuses that had occurred in optometry, (2) enabling the public to fix professional responsibility on a human being whose name is known, rather than on an anonymous assumed name, and (3) enhancing the doctor-patient relationship and thereby increasing the likelihood of better vision care. Furthermore, as a part of each of these purposes, there was the transcendant intent to insure that when information is disseminated to the public, it must be more truthful, more valuable, and less deceptive than in the past.

These various purposes behind §5.13(d) were analyzed extenstively by the Texas Supreme Court in *Texas State* 

Board of Examiners in Optometry v. Carp 412 S.W.2d 307 (Tex. 1967), cert. denied, 389 U.S. 52 (1967) [hereinafter referred to as Carp]. In Carp, the Texas Supreme Court analyzed the purposes behind the professional responsibility rule of the Texas Optometry Board which was later enacted into law as §5.13 of the Optometry Act. Although Carp did not deal with any federal constitutional questions, the conclusions reached by the Texas Supreme Court shed a great deal of light on the purposes behind §5.13(d) and on the abuses that prompted its adoption. The Carp case will be referred to throughout Appellant TOA's analysis of the purposes behind §5.13(d).

1. The State has an interest in protecting the public from the assumed name abuses which at one time plagued the profession of optometry in Texas.

Prior to the enactment of §5.13(d) and its predecessor (the professional responsibility rule), optometry in Texas was plagued by a history of trade name abuse. One of the primary purposes of the enactment of §5.13(d) was to protect the public from the abuses that had previously occurred. In *Carp*, the Texas Supreme Court cited several examples of abuses which had characterized optometry in Texas.

The court noted that some optometrists were operating offices under fictitious names, using the assumed names to mislead and take advantage of the public.

"Dr. Carp operates 71 offices in Texas. He advertises them under the following trade names: Luck Optical, Luck One Price Optical, Mast Optical, Mesa Optical, Mack Optical,

Plains Optical, Amarillo Optical, Lubbock Optical, Panhandle Optical and Mission Optical. From time to time he adds, drops, or changes the trade name at a particular office although the licensed optometrists employed in that office remain the same . . .

"Illustrative of Dr. Carp's trade or assumed name practices is the situation that exists in Wichita Falls. Within a two block area in that city, Dr. Carp maintains offices operated under the names of Mast Optical, Luck Optical, and Lee Optical. The supervisor oversees these three offices. Each office dispenses the same optical goods and services and uses the same kind of equipment. Optometrists are shifted from one location to the other. Dr. Carp's advertising represents to the public that these three offices are in competition with each other thereby creating the false impression that they are each independently owned and operated. Similar situations exist in Dallas and El Paso." Carp at 311-312.

By using various assumed names, some optometrists were misleading the public as to the ownership and degree of competition present in various optometry practices. Another frequent abuse resulted from one optometrist assuming the name of another licensed optometrist. As the Texas Supreme Court recognized:

"He [Dr. Carp] has purchased the practices of licensed optometrists and practices under their name although they are no longer associated with the respective offices in any manner. . . .

"Dr. Carp has advertised and practiced under the names of Douglas Optical, Shannon Optical, Pearl Optical, Lee Optical, Lee Optical Company and Dr. L.H. Luck. Those are the names of licensed optometrists who sold Dr. Carp their locations and the use of their names, but continued their practice independently of Dr. Carp." Carp at 311-313.

Prior to the enactment of the Professional Responsibility Rule in Texas, one licensed optometrist would freely practice under the name of another licensed optometrist, even though the latter optometrist was no longer associated with the business in any way. In fact, that latter optometrist might elsewhere be engaging in a completely independent practice of his own. Abuses such as these prompted the legislature to require that an optometrist practice under the name in which he was licensed.

In enacting §5.13(d), the legislature was responding to the peculiar history of optometry in Texas. Assumed name abuse and other misrepresentations associated with assumed name practices were widespread in Texas. Among those contributing to the abuse was the Appellee herein, Dr. Rogers. The Texas Supreme Court specifically addressed the manner of practice of Dr. Roger's, noting:

"Texas State Optical's advertising leaves the impression that one of the Doctor Rogers is present at a particular office. Actually they have neither been inside nor seen some of their 82 offices distributed generally over Texas. They list their names in phone books and cities where

they do not purport to practice optometry and on plaques showing the names of the optometrists who serve particular offices though they do not in fact practice at such offices. Such practices are deceptive and misleading." *Carp* at 313.

The history of actual abuse that existed in Texas prior to the enactment of the Professional Responsibility Rules, prompted the Texas Optometry Board . . . and later the legislature . . . to enact strict professional responsibility rules. Because of optometry's particular history of assumed name abuse which included deception as to the degree of competition and deception as to identity of the practicing optometrist, the legislature was justified in requiring optometrists to practice under the name in which they are licensed.

## 2. The State has an interest in enabling the public to fix professional responsibility.

Section 5.13(d) requires that an optometrist practice under his own name, and not hide behind the anonymity of an assumed name. When an optometrist practices under his own name, the patient knows immediately who the responsible optometrist is. He is more likely to know what individual or individuals he will be dealing with, and who will be most immediately responsible if errors are made. Similarly, he knows that the optometrist has a personal reputation to maintain, and therefore has a greater personal interest in insuring that he does his job correctly.

"The reason for this section is that the trade or assumed name practice, like fee-splitting,

disrupts the optometrist-patient relationship by concealing the identity and burying the responsibility of the licensed optometrist." *Carp* at 311.

When a patient goes to an optometrist practicing under his own name, the name in which he was licensed, the patient knows upfront who the responsible optometrist will be, and he knows in advance the name under which the optometrist is licensed with the Texas Optometry Board. If optometrists are permitted to practice under fictitious or assumed names, then the patients will not be aware of the name in which the optometrist is licensed.

"The practice of optometry under a trade name is a holding out to the public that the trade name is licensed. The result is that the identity of the licensed practicing optometrists is hidden behind the unlicensed trade name." Carp at 312, emphasis added.

Section 5.13(d) fixes professional responsibility, informing the consumer immediately of the identity of an individual optometrist who will be professionally responsible for the services rendered. The State has an interest in fixing such responsibility.

3. The State has an interest in insuring that optometrists do not easily abandon a bad reputation.

Closely related to the interest of assisting the public to fix professional responsibility, is the State's interest in insuring that an optometrist "own up" to his professional reputation. When an optometrist must practice in the name in which he has been licensed, he will, over the course of his professional career, develop a reputation. The reputation may be one of excellence, or it may be one of incompetence and shoddy work. But, whether the reputation is good or bad, the reputation will follow the optometrist throughout his career, since, wherever he practices, he must practice under the name in which he has been licensed.

However, if optometrists are freely permitted to practice under a fictitious or assumed name, an optometrist may easily rid himself of a bad reputation. When an optometrist's assumed name develops a bad reputation, the optometrist need only pick a new assumed name. He will automatically be able to start over with a clean slate. As was indicated earlier, the Texas Supreme Court expressly realized that such was happening in Texas before enactment of §5.13(d).

"From time to time he [Dr. Carp] adds, drops, or changes the trade name at a particular office although the licensed optometrists employed at the office remain the same." *Carp* at 311.

The State has an interest in insuring that the bad reputation as well as the good reputation of an optometrist follows an optometrist throughout his career. Such reputations provide valuable commercial information to the consuming public. By requiring an optometrist to practice in his own name, it is more likely that the consuming public will be made aware of a particular optometrist's reputation for competence . . . or incompetence.

4. The State has an interest in enhancing the doctorpatient relationship.

The Section 5.13(d) requirement that an optometrist practice in his own name enhances the doctor-patient relationship. A doctor-patient relationship is naturally strengthened when the patient knows the identity of the optometrist attending him. Under an assumed name practice, there is no certainty that the patient will ever know the identity of the attending optometrist. In fact, experience has shown that there is a correlation between assumed name practice and minimal personal relationships between doctor and patient. Dr. Richard Shannon, former owner of an assumed name optometric chain in Texas, testified to that fact. His experience, prior to the requirement that optometrists practice under their own names, vividly confirms legislative fears about the deterioration of the doctor-patient relationship. Dr. Shannon's testimony was as follows:

- Q. Was there a continuing personal relationship between the doctors of optometry and the patients at your local offices?
- A. No. There was no— for the most part, there was no personal relationship. The patient was an individual that had a service performed by a doctor, and as soon as that patient got out the doctor's door, another one came in. For the most part, the doctor would not recall that patient unless it was a most unusual circumstance that went along with it.
- Q. You are saying, then, that the examining doctor did not know the patients by name or remember them by name?

- A. That's correct.
- Q. How about vice versa?
- A. I would say the same. In most cases the patients were not introduced to the doctor in our offices. The patient would be told by one of the girls or one of the clerks in the office, "The doctor is ready for you. Come with me.", and she in turn would take him or her into the examining room and say. "Please be seated. The doctor will be with you in just a moment."
- Q. In what percentage of the new patient cases would the patient previously know the doctor by some—
- A. It would be very low.

A. The only time a doctor would know— or the patient would know the doctor, that I can recall, is when we employed a doctor who had been located in that particular locale, and we placed him into one of our offices located in that immediate area. This hap-

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pened on very, very infrequent occasions." (Shannon Deposition, Appendix pp. 112-113).

Dr. Shannon's testimony confirms that in an assumed name practice the identity of the optometrist and the care of the patient is deemphasized. This de-humanization necessarily leads to a potential deterioration of the doctor-patient relationship. I uiring an optometrist to practice under his own nan a legislature had taken an important step to humanize and enhance the doctorpatient relationship.

Furthermore the legislature has made it easier for a patient to insure a *continuing* relationship with his doctor. If an optometrist is one of many optometrists practicing under a single assumed name, or if an optometrist is shuttled between various offices bearing one or more assumed names, or if the optometrist periodically changes the assumed name under which he practices, it becomes more difficult for a patient to return to the same optometrist who has previously examined him. Consequently, the patient may be less likely to develop a continuing relationship with a single optometrist. He is less able to return to the individual optometrist who is most familiar with that patient's optometric history.

Section 5.13(d) serves a legitimate state interest by insuring that a patient knows the identity of the optometrist, thereby enhancing a closer doctor-patient relationship and a continuity of vision care.

5. The State has an interest in enhancing the likelihood of quality vision care.

It is an axiom of human nature that accountability tends to breed quality while anonymity and lack of accountability tend to breed indifference. Section 5.13(d) puts accountability of the optometrist in the forefront and thereby increases the likelihood that the optometrist will render the highest quality of vision care.

Section 5.13(d) requires that the responsible optometrist inform his patient of his true identity from the very outset of their professional relationship. This establishes in the mind of the patient and the optometrist that the doctor himself — not just some anonymous assumed

name company— is personally and professionally responsible for the vision care provided. This emphasis on upfront accountability naturally increases the likelihood of quality vision care.

As discussed previously, in an assumed name practice, the identity and reputation of the individual optometrist is deemphasized and the doctor-patient relationship suffers. The relative anonymity and the decreased emphasis on personal accountability inherent in a trade name practice logically tends to cause the optometrist to feel less responsible for his patients and less fearful of repercussions from the patients' dissatisfaction or from the doctor's poor quality of service. Such an optometrist who practices under an assumed name can afford to be less concerned about his long term reputation since he may effectively abandon a bad reputation by taking a different assumed name. The increased likelihood of indifference that is engendered by an assumed name practice. results in a corresponding likelihood that quality of vision care will decline.

Section 5.13(d), therefore, enhances the likelihood of quality care by placing an emphasis on identity, personal accountability, a strengthened doctor-patient relationship, and the optometrist's knowledge that his personal reputation is permanently at stake. These will naturally increase the likelihood that the optometrist will render higher quality vision care.

6. The State has an interest in insuring that the public has easier access to information which is more truthful and more valuable than might otherwise be be available.

By requiring an optometrist to practice in the name in which he has been licensed, the state is requiring that the optometrist convey more information to the consumer than might otherwise be conveyed. The public is automatically made aware of the identity of the responsible optometrist. The public is made aware of the name under which that optometrist is licensed with the State. And the public is given access to the complete reputation of the responsible optometrist, not just that portion of his reputation which is associated with one particular assumed name. Such information is not conveyed by a fictitious or assumed name.

Furthermore, the State is requiring that this information be made available upfront while the consumer still has the opportunity to make a free choice among optometrists.

These state interests would not be fully served by merely requiring an optometrist to hang a license or diploma in his examining room or in his lobby. By the time the patient reaches that point on his quest for vision care, the patient is already in the grasp of the optometrist and has made the irrevocable decision to utilize the services of such optometrist. The state has a valid interest in insuring that the responsible optometrist's name is known upfront before the patient enters the optometrist's office and early enough to enable the patient to compare and check out reputation.

In summary, the state has valid interests in prohibiting an optometrist from practicing under an assumed name. Section 5.13(d) protects the public from the abuses that were rampant in Texas optometry prior to its enactment. It better enables the public to fix professional responsibility, and it enhances the doctor-patient relationship. It increases the likelihood of quality eye care and it provides the public more truthful and more valuable information than might otherwise be available.

B. Important First Amendment interests are promoted by §5.13(d).

After analyzing the state interests served by particular regulations of commercial speech, the balancing test next dictates that those state interests be balanced with First Amendment interests. Those First Amendment interests have generally been defined by this Court as: (1) the seller's interest in the dissemination of information, (2) the consumer's interest in receiving valuable commercial information, and (3) society's interest in the free flow of commercial information. In both Bates and Virginia Pharmacy, the regulations in question imparied each of these First Amendment interests. However, in the case at bar, these First Amendment interests are actually enhanced by §5.13(d), rather than impaired. Therefore, in this case these First Amendment interests speak in favor of §5.13(d), rather than against the regulation as they did in *Bates* and *Virginia Pharmacy*.

1. The seller's interest in disseminating information is not impaired by §5.13(d).

In Bates and Virginia Pharmacy this Court has noted that in the commercial arena the seller has an interest in

disseminating certain information— in getting certain messages across to the public. This interest is not significantly imparied by §5.13(d). The requirement that an optometrist practice under the name in which he is licensed does not prevent an optometrist from disseminating any particular message, and it does not prevent an optometrist from using any particular media for communicating that message. At most, §5.13(d) imposes minimal restrictions on the form of a commercial communication, requiring that it be in such a form as to be less deceptive.

a. No message is stifled. Section 5.13(d) does not speak to whether an optometrist may communicate information as to the availability of his services, the price of his services, the quality of his services, or any other commercial information. Whether or not an optometrist is required to practice exclusively under his own name has absolutely no bearing upon his ability to communicate such commercial information. There is no message which is conveyed by the use of a fictitious name which cannot be communicated by an optometrist using the name in which he is licensed.

Section 5.13(d) does not prevent the communication of any particular message to the public. This was not the case in *Virginia Pharmacy* where a statute suppressed the message of the price of pharmaceutical products. This

was not the case in *Bates* in which a statute prohibited an attorney from communicating the message of the availability of his services and the price of routine services to be offered. This was not the case in *Linmark*, *infra*, where a statute was found to restrict communication of a message that houses were for sale. Unlike these cases, §5.13(d) does not stifle any message that an optometrist might communicate to the public.

b. No media is stifled. Unlike Linmark Associates Inc. v. Township of Willingboro 431 U.S. 85 (1977) [hereinafter called Linmark], §5.13(d) does not restrict the use of any particular medium of communication. In Linmark, this Court struck down a statute which prohibited the use of "For Sale" signs in communicating a commercial message. In Bates and Virginia Pharmacy, the statutes prohibited advertising as a medium for communication of certain messages concerning price and availability of services. Unlike these cases, Section 5.13(d) does not stifle any particular medium of communication. Section 5.13(d) does not speak to whether or not

Dr. Rogers has argued that a name implicitly conveys certain information regarding the reputation associated with that name. If that is the case, then all names, whether assumed or real, "convey" such a message. Whether an optometrist practices under his own name or under his real name, a certain reputation will attach to that name and be "communicated" by it. Requiring an optometrist to practice under his own name does not restrict "communication" of reputation, since that message will be "conveyed" by the name under which he is licensed.

<sup>&</sup>lt;sup>2</sup> In his motion to affirm, Dr. Rogers alleges that §5.13(d) will increase the cost of advertising since each optometric office "must advertise separately rather than have a single trade name advertisement that benefits several offices." Page 56 of Rogers' Motion to Affirm. He argues that requiring an optometrist to practice under his own name lessens the availability of advertising as a media for communication. Dr. Rogers' reasoning here is faulty in the §5.13(d) does not prevent a group of optometrists from pooling together to reduce production costs of advertising. A single advertisement could easily convey the names and addresses of several optometrists within an area. The fact that the optometrists involved must be listed under their own names would not significantly affect the availability of advertising as a media of communication. As this Court noted in Virginia Pharmacy at page 773, "Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely."

optometrists may advertise. It does not speak to whether or not optometrists may communicate their commercial messages via television, radio, newspaper, signs, or other means of communication.

c. At most, §5.13(d) imposes minimal restrictions on the wording or form of a message so as to make it less deceptive. Section 5.13(d) requires that an optometrist practice under his own name, not under a fictitious or assumed name. At most this is only a restriction on the form or wording of the communication which informs the public of the identity of the optometrist. By requiring the optometrist to practice under his own name, the optometrist is merely being required to couch his communication in such form as to be less deceptive. Rather than communicate under a fictitious or assumed name which does not convey meaningful information to the public, the optometrist must communicate under his own name which immediately communicates his identity and the name in which he is licensed. As this Court noted in Virginia Pharmacy at page 772, the government may require that commercial speech appear in such a form, or include such additional information, warnings, or disclaimers as necessary to make it less deceptive.

Section 5.13(d) of the Texas Optometry Act at most affects the form of a message, requiring such form to be less deceptive. It does not restrict the content of the message nor does it restrict the media by which such a message may be conveyed. As such, Section 5.13(d) does not significantly affect, one way or another, a seller's interest in disseminating commercial information to the public.

2. The consumer's interest in receiving valuable commercial information is enhanced by §5.13(d).

The second of the First Amendment interests that must be balanced is the consumer's interest in receiving valuable commercial information. Section 5.13(d) does not impair this interest. In fact, it insures that *more* information will be available to the public, and that the information will be more easily accessible to the consumer and more readily available when the consumer most needs such information. Section 5.13(d) therefore enhances the consumer's interest in receiving commercial information.

a. Section 5.13(d) does not deprive the consumer of any valuable information. The statutes in Bigelow, Virginia Pharmacy, Linmark, and Bates either prohibited or severely restricted valuable commercial information from being disseminated. As such, these restrictions deprived consumers of valuable commercial information. In Bigelow the statute prohibited the advertising of availability of abortions, even though abortions were a legal activity. The prohibition deprived consumers of information concerning the availability of a lawful service. In Virginia Pharmacy, the statute prohibited the advertising of price information concerning pharmaceutical products. The statute deprived consumers of price information which is vital for the making of an intelligent commercial decision. In Linmark, the statute prohibited the placing of "For Sale" signs in the yards of houses. The Court determined that this prohibition had the effect of depriving the consumer of information as to the availability of houses for sale. In *Bates*, the statute prohibited attorneys from advertising the availability of services and prices. The statute was found to deprive the consuming

public of valuable information which was necessary to make an intelligent commercial decision.

Unlike the statutes in *Bigelow*, *Virginia Pharmacy*, *Linmark* and *Bates*, the statute in our case does not deprive the public of any valuable commercial information. It does not deprive the public of knowledge of availability of services, price of services, quality of services, or any other information which is necessary to make an intelligent commercial decision. The requirement that an optometrist refrain from using a fictitious name does not deprive consumers of any information which is necessary in making an intelligent commercial decision as to which optometrist to patronize. If anything, by requiring an optometrist to practice under his licensed name, the consumer is actually given more information than he would be given if the optometrist were free to practice under a fictitious name.

b. Section 5.13(b) actually provides more information than might otherwise be available to the consumer. The requirement that an optometrist practices under his licensed name rather than an assumed or fictitious name actually assures that more information will be conveyed to the consumer than might otherwise be the case.

When an optometrist is required to practice under his true name, that name immediately notifies the consumer of the identity of the responsible optometrist. However, if an optometrist is permitted to practice under an assumed or fictitious name, that information is not conveyed to the public. The true name of the optometrist conveys more information than an assumed name would.

When an optometrist is required to practice in his true name, the reputation of an entire career attaches to that name. However, if an optometrist practices under an assumed name, only the limited reputation associated with that assumed name is "conveyed" to the public. Consequently, the true name of the optometrist conveys more information to the public. The true name is more likely to convey the bad elements of a reputation as well as the good elements, since the bad elements will not be lost behind a succession of assumed names. Section 5.13(d) tends to convey more information as to bad reputation, and such information is certainly valuable to the consumer in deciding in whose hands his vision care will be placed.

When an optometrist practices under an assumed name, it is much more difficult for the consumer to obtain from his friends or acquaintances information concerning the reputation of a particular optometrist, and it is much more difficult for him to determine whether or not that optometrist is qualified or is licensed with the State.

c. Section 5.13(d) provides easier and earlier access to valuable information. When the true name of the optometrist must be used upfront, the consumers search for the true identity of the responsible optometrist involves less effort and less difficulty. In contrast, when an optometrist practices under an assumed name, the consumer must make a concerted effort to determine the identity of the responsible optometrist. Section 5.13(d), therefore, makes it easier for the patient to receive this valuable information.

Also, this information is gained earlier . . . at the initial stages of his search for an optometrist. This is exactly the

time in which such information is most valuable to comparison shopper consumers interested in quality eye care. If a patient knows the identity of the responsible optometrist up front, he may intelligently investigate an optometrist, determine his reputation, make inquiry among his friends regarding the optometrist's reputation, and generally compare him with other optometrists in the area. However, a patient's ability to conduct such comparisons is seriously impaired if the patient does not know the identity of the responsible optometrist until he has actually entered the office of that optometrist. Under an assumed name practice, a patient may not learn the identity of his optometrist until he is actually being examined. (In fact Dr. Shannon's testimony has indicated that many patients will not learn the identity of a doctor even at that stage. See supra at p. 22 and Shannon deposition, Appendix pp. 112-113). Section 5.13(d) insures that the consumer is more easily made aware of the identity of the responsible optometrist and that he is made aware early enough so that that information will be helpful in making an important decision regarding his eyesight and vision . . . a decision of a bit more importance than the purchase of a bag of beans or a box of cereal.

3. Section 5.13(d) enhances society's interest in the free flow of commercial information.

Unlike the statutes in the other balancing test cases, §5.13(d) does not impair the free flow of commercial information. If anything §5.13(d) requires that the commercial information be more truthful and more informative.

Section 5.13(d) requires an optometrist to use his true name, rather than a fictitious or assumed one. As such, §5.13(d) requires that truthful information be conveyed, rather than false information. This does not impair the free flow of commercial information. As this Court noted in *Virginia Pharmacy* at page 773, there is little likelihood that the free flow of commercial information will be "chilled" by proper regulation. This Court has repeatedly recognized that regulation to assure truthfulness will not discourage protected speech. *Bates* at 383. Since Section 5.13(d) does not prevent an optometrist from communicating valuable information over whatever media he wishes, and since §5.13(d) does not restrict valuable information, §5.13(d) has a minimal impact on the free flow of commercial information.

In fact, by requiring disclosure of the optometrist's true identity up front when it can be valuable in the decision making process, §5.13(d) actually increases the flow of information. By requiring the dissemination of information which might not otherwise be made available to the public, the flow of valuable information is increased. As this Court has noted, the government may require that commercial speech appear in such a form, or include such additional information, warnings, or disclaimers as are necessary to make it less deceptive. Virginia Pharmacy at 772. Although such regulations might theoretically have some effect on the free flow of commercial information, on balance, the effect is to increase the flow of information and to insure that the information which does flow is more accurate. "The First Amendment . . . does not prohibit the State from

insuring that the stream of commercial information flows cleanly as well as freely." Virginia Pharmacy at 771-772.

## 4. Section 5.13(d) strikes a fair balance.

After having reviewed the various State and First Amendment interests affected by §5.13(d), it is necessary to balance these different interests to determine whether or not the statute is an impermissible infringement upon First Amendment rights.

In Bates and Virginia Pharmacy the statutes under challenge were found to impair each of the First Amendment interests — the interest to the seller in disseminating information, the interest to the buyer in receiving valuable information, and the interest of society in a free flow of commercial information. Because the statutes in question impaired those interests, those First Amendment interests were balanced against the other interests offered by the State. In both Bates and Virginia Pharmacy, the interests offered by the State were not found to be sufficient enough to justify impairment of the First Amendment interests.

In applying the balancing test to §5.13(d), this Court is faced with a somewhat different balance. In contrast to *Bates* and *Virginia Pharmacy*, the First Amendment interests in our case are not impaired, but are actually enhanced by §5.13(d). Therefore, the First Amendment interests actually speak in favor of the constitutionality of §5.13(d).

Balanced on the one side in favor of §5.13(d) are the various State interests: the State's interest in protecting the public from the assumed name abuses which plagued Texas optometry prior to the enactment of the statute, the State's interests in enabling the public to fix professional responsibility, the State's interest in insuring that optometrists do not easily abandon a bad reputation, the State's interest in enhancing the doctor-patient relationship, the State's interst in enhancing the likelihood of quality vision care, and the State's interest in insuring the public has easier access to information which is more truthful and more valuable than that which might otherwise be available. Also on the side of the scale in favor of §5.13(d) are the various First Amendment interests. The buyer's interest in receiving valuable information is enhanced, not impaired by § 5.13(d). Society's interest in the free flow of commercial information is similarly enhanced, not impaired, and society's interest in a clean flow of commercial information is enhanced. Finally, the seller's interest in the dissemination of information is not impaired.

In sharp contrast to the many interests favoring the constitutionality of §5.13(d), is the fact that there are no significant interests which are impaired by §5.13(d). None of the First Amendment interests impaired by the statutes in *Bates* and *Virginia Pharmacy* are impaired here. There is no significant commercial message which is prevented from being disseminated. Unlike *Bates* and *Virginia* 

Pharmacy, this statute insures that more information is communicated rather than less information.<sup>3</sup>

As a balance is struck between the various interests affected by §5.13(d), it becomes apparent that both the State interests and the First Amendment interests overwhelmingly tilt the scale in favor of §5.13(d). Under the First Amendment balancing test of *Bates* and *Virginia Pharmacy*, it is clear that §5.13(d) is valid and is not a significant infringement on First Amendment freedom of commercial speech.

# III. THIS COURT HAS INDICATED THE NEED FOR AND THE VALIDITY OF REGULATIONS SUCH AS SECTION 5.13(d).

In this Court's decisions in Bigelow, Virginia Pharmacy, Linmark, and Bates, it has been made clear that

<sup>3</sup>Any harm alleged by Dr. Rogers must be compared and juxtaposed to the harm sought to be remedied by §5.13(d). The harms allegedly created by §5.13(d) must exceed and outweigh the benefits flowing to the public therefrom.

Assuming arguendo that Dr. Rogers is correct in arguing that the assumed name ban deprives the public of some commercial information, the balancing test is nonetheless satisfied. The legicature has made a studied decision that the disclosure of individual accountability is of greater public interest than the disclosure of assumed names. Moreoever, the Texas Supreme Court has specifically recognized the harms and abuses of the trade name practice of optometry in Texas. Lastly, these harms and abuses have been amply established by the evidence in our case. When so extensively justified by the legislature, the Texas courts, and the evidence in the record, TOA would respectfully submit that the legislature's judgment of the proper balance of the relative harms should not be usurped by this Court under the balancing test unless the legislature was clearly wrong.

commercial speech is subject to some degree of First Amendment protection. However, this Court has expressly recognized that commercial speech may be regulated more extensively than speech which does not convey a commercial message, and this Court has gone out of its way to point out that regulation of false or deceptive commercial speech is permissible. The exact extent to which commercial speech is protected by the First Amendment is uncertain since the concept of "freedom of commercial speech" is just now emerging. The outer limits of permissible regulation have not been clearly defined. However, this Court has noted several examples in which regulation is permissible.

As with non-commercial speech, reasonable restrictions may be placed on the time, place, or manner of commercial speech. Bates at 384. Furthermore, this Court has specifically noted that regulations which are impermissible for non-commercial speech may be permissible in the commercial arena since commercial speech is to be afforded less protection than non-commercial speech. Virginia Pharmacy at 771, note 24. For example, the doctrine of overbroadness does not apply to commercial speech as it does to non-commercial speech. Bates at 382. Similarly the prohibition against prior restraints may not apply to commercial speech. Virginia Pharmacy at 771. note 24. And, perhaps most significantly, this Court has noted that the content of commercial speech may determine the extent of its protection. Young v. American Mini Theatres, Inc. 425 U.S. 50, 68-69 (1976) [hereinafter called Youngl.

The Court has repeatedly recognized that commercial speech which is false, deceptive, or even merely misleading is subject to restraint. Virginia Pharmacy at 771, Bates at 383. And the Government's right to restrain misleading as well as false statements in labels and advertising has long been recognized. Young at 68. The Government may require that commercial speech appear in such a form, or include such additional information, warnings, or disclaimers as are necessary to make it less deceptive. Virginia Pharmacy at 772. And the Government may prohibit businessmen from making statements which, though literally true, are potentially deceptive. Young at 68.

In fact, commercial speech which is not even potentially misleading may, to a certain extent, be regulated on the basis of its content. As this Court recognized in Young, a state statute may permit highway billboards to advertise businesses located in the neighborhood, but not elsewhere. Young at 68, citing Markham Advertising Company v. State, 773 Wash.2nd 405, 39 P.2nd 248 (1968), (appeal dismissed for want of substantial Federal question, 393 U.S. 316.), and a public transit system which accepts some advertisting may refuse to accept advertisement with a political message. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

This Court has made it clear that commercial speech may be more extensively regulated than non-commercial speech. It has specifically recognized the right to regulate such speech to make it more truthful, more informational, and less deceptive. Section 5.13(d) is a regulation intended to enhance truthfulness by requiring the true name of an optometrist to be disclosed rather than a fictitious or assumed name. It enhances informational con-

tent by requiring that the identity of the optometrist be made known up front while the consumer still has the power to choose between various optometrists. By identifying up front who the responsible optometrist will be rather than requiring the consumer to penetrate layers of assumed names, §5.13(d) prevents the consumer from being mislead. Thus, §5.13(d) is a permissible regulation of commercial speech.

## IV. SECTION 5.13(d) IS NOT UNCONSTITUTIONAL AS BEING OVERBROAD.

In his motion to affirm, Dr. Rogers has argued that §5.13(d) is unconstitutionally overbroad in that it prohibits optometrists from using any trade name, not just those which are deceptive. This argument is fallacious.

Fictitious or assumed names are by definition false, and they serve to mask the true identity of the optometrist using that false name. To one degree or another, such a false name is deceptive and misleading. The degree of harm resulting from such deception may vary from situation to situation, just as the harm resulting from any deceptive communication will vary depending upon the circumstances.

The Legislature has not acted overbroadly in enacting §5.13(d). Since all assumed names are to some extent false and misleading. §5.13(d) accomplishes exactly what it is intended to do without being overbroad. It singles out a specific type of communication that is by definition false and misleading. It prohibits that form, and only that form, of communication and does not inhibit the conveyance of any message or the use of any media.

Therefore, §5.13(d) is not overbroad. In any event, this Court has noted that the overbroadness doctrine does not apply to commercial speech. *Bates* at 382.

Furthermore, the assumed name of "Texas State Optical," under which Dr. Rogers seeks to practice optometry, itself contains all of the deceptions inherent in an assumed name. The term "Texas State Optical" masks the true name of the responsible optometrist, it does not convey any information as to licensure of the optometrist, and the name may easily be changed if it becomes associated with a poor reputation. The name "Texas State Optical" conveys no meaningful information about the optometrist. If anything, the name might mislead some customers to believe that "Texas State Optical" is somehow officially associated with the State of Texas, which, of course, it is not. Dr. Rogers may not challenge §5.13(d) as being overbroad since the assumed name he seeks to use for the practice of optometry evidences the very deceptions the legislature has attempted to prevent.4

In any event, §5.13(d) is not overbroad. It deals only with a limited type of "communication" — assumed names in the practice of optometry. As such it deals only with speech that is, by definition, untruthful and misleading to one degree or another.

## V. THE BIGELOW AND BATES CASES DID NOT IMPLICITLY RECOGNIZE A CONSTITUTION-AL RIGHT TO USE AN ASSUMED NAME.

Dr. Rogers argues in his motion to affirm that this Court implicitly recognized the constitutional right to use assumed names when it permitted advertising by the "Women's Center" in Bigelow and the "Legal Clinic of Bates and O'Steen" in Bates. See Rogers' motion to affirm pages 46 and 55-56. This argument is also fallacious. Bigelow addressed only the issue of whether or not a blanket prohibition of advertising of a legal activity is constitutional. That case had nothing to do with the right to use trade names and this Court did not address the question. In Bates, the Court found that the use of "Legal Clinic of Bates and O'Steen" was not deceptive. In that case the responsible attorneys, Bates and O'Steen, used their own name, they were not practicing under an assumed name. The term "Legal Clinic" was a generic description of their office much like "The Law Office of Bates and O'Steen" would be. Section 5.13(d) would not prohibit optometrists from practicing under the name "Optometry Office of Bates and O'Steen" or "Optometry Clinic of Bates and O'Steen," provided Bates and O'Steen were licensed optometrists practicing on the premises. In such a case they would be practicing under their own names. The Bates case did not address the question of whether a prohibition of the use of assumed names is constitutional. Therefore, neither Bates nor Bigelow "implicitly" recognize a constitutional right to use a fictitious name, and neither are controlling in the case at bar.

<sup>&#</sup>x27;It should be remembered that the Optometry Act fully allows Dr. Rogers' opticianries to use the assumed name of "Texas State Optical." There is no statutory prohibition against the use of assumed names in the merchandising business of selling frames and filling eyeglass prescriptions.

#### Conclusion

On the basis of the foregoing, the Texas Optometric Association respectfully urges that Article 4552, Section 5.13(d), which prohibits an optometrist from practicing under or using an assumed name, is constitutional under the First Amendment. The Texas Optometric Association prays that the judgment of the three-judge district court be reversed in part and rendered on the issue of the constitutionality of Section 5.13(d).

Respectfully submitted, Larry Niemann Fred Niemann, Jr. NIEMANN & NIEMANN 1210 American Bank Tower Austin, Texas 78701 512/474-6901

Larry Nemann
Attorneys for Appellant Texas

Optometric Association, Inc.

#### Certificate of Service

I hereby certify that a true and correct copy of this brief has been deposited in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to Robert Q. Keith, attorney for Dr. N. Jay Rogers, 1400 San Jacinto Building, Beaumont, Texas 77701, Brian R. Davis, attorney and W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas

Chapter, 408 First Federal Plaza, 200 E. 10th Street, Austin, Texas 78701, John G. Tucker, attorney for Dr. E Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora, invidiually, P.O. Box 1751, Beaumont, Texas 77704, Dorothy Prengler, Assistant Attorney General of Texas, attorney for Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Sal Mora, in their official capacity as members of the Texas Optometry Board, Supreme Court Building, P.O. Box 12548, Austin, Texas 78711, and Victor J. Rogers, II, 3434 One Allen Center Houston, Texas 77002, on this 19th day of June, 1978.

LARRY NIEMANN

FILED

IN THE

JUN 21 1978

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1163

DR. E. RICHARD FRIEDMAN, et al.,

Appellants

V.

DR. N. JAY ROGERS, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

#### BRIEF FOR THE APPELLANTS

JOHN L. HILL Attorney General of Texas

DAVID KENDALL First Assistant

STEVE BICKERSTAFF Assistant Attorney General

DOROTHY PRENGLER Assistant Attorney General

RICHARD ARNETT Assistant Attorney General

P.O. Box 12548 Capitol Station Austin, Texas 78711 (512) 475-3131

Attorneys for Appellants in their Official Capacities

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#### IN THE

## SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1977

No. 77-1163

DR. E. RICHARD FRIEDMAN, et al.,

Appellants

DR. N. JAY ROGERS, et al.,

v.

Appellees

#### BRIEF FOR THE APPELLANTS

This appeal is from a judgment of the United States Three-Judge District Court for the Eastern District of Texas, entered on October 27, 1977, declaring sections 5.13(d) and 5.09(a) of the Texas Optometry Act, Art. 4552, Tex. Rev. Civ. Stat. Ann., to be unconstitutional in part and enjoining the enforcement of such statutes. The suit was brought on August 25, 1975, by one member of the Texas Optometry Board, Dr. N. Jay Rogers, against the remaining five members of the Board, Dr. E. Richard Friedman, Dr. John Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Salvador S. Mora, both in their individual and official capacities. W. J. Dickinson, both individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, intervened as a plaintiff in the district court, and the Texas Optometric Association, Inc., intervened as a defendant.

#### OPINION BELOW

The opinion of the District Court for the Eastern District of Texas, Beaumont Division, entered on September 12, 1977, is reported at 438 F. Supp. 428. A copy of that opinion is reproduced in Appellants' Jurisdictional Statement at A-6 through A-17. The Final Judgment of the Court below, entered on October 27, 1977, is not reported, and that judgment is reproduced in Appellants' Jurisdictional Statement at A-1 through A-5.

#### JURISDICTION

This suit was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§1331, 1343, 2201, 2281, and 2284 in the United States District Court for the Eastern District of Texas, to enjoin as unconstitutional the enforcement of sections 2.02, 5.09(a), 5.13(d), and 5.15(e) of the Texas Optometry Act [hereinafter the Act]. A three-judge district court was convened to hear this cause as then required by 28 U.S.C. §§2281 and 2284. The final judgment of the court was entered on October 27, 1977. The judgment declared a portion of sections 5.09(a) and 5.13(d) of the Act unconstitutional and enjoined Defendants from enforcing such provisions. Notice of appeal was filed in the court below on December 20, 1977. Appellants' Jurisdictional Statement was filed in this Court on February 16, 1978. Probable Jurisdiction was noted on April 17, 1978 and this case was consolidated with Numbers 77-1164 and 77-1186. 46 U.S.L.W. 3649. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b). Jurisdiction is sustained by the following cases which required this case to be heard by a three-judge district court and recognize a direct appeal to this Court from judgments thereof. Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977); Ohio Bureau of Employment Services v. Hodorz,

431 U.S. 471 (1977); Chapman v. Meier, 420 U.S. 1, 14 (1975).

#### STATUTE INVOLVED

The court below held that a portion of section 5.13(d) of the Texas Optometry Act, Article 4552, Vol. 13, Tex. Rev. Civ. Stat. Ann., 449,481, was unconstitutional and enjoined its enforcement. The statute reads, in pertinent part, as follows:

Section 5.13(d). No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas....

#### **QUESTIONS PRESENTED**

- I. Whether the lower court erred in holding Article 4552-5.13(d) unconstitutional under the first amendment as an unwarranted restriction on the free flow of commercial information.
- II. Whether the injunction issued by the court below, enjoining Appellants from enforcing any "provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name", should be vacated on the grounds that it is overbroad, it does not specifically state what action is enjoined, and it encompasses statutory provisions not raised or litigated in the court below.
- III. Whether several Orders Pendente Lite entered by the court below exempting individual optometrists from provisions of the Texas Optometry Act should be vacated because such orders are overbroad, do

not specifically state what provisions the Board is prohibited from enforcing, and encompass issues not raised or litigated in the court below.

#### STATEMENT OF THE CASE

As noted above, the lower court ruled that sections 5.09(a) and 5.13(d) of Article 4552 were unconstitutional in part. Section 5.09(a) of the Act prohibited price advertising of any kind by optometrists.1 Even though the facts in the instant case with regard to section 5.09(a) can be distinguished from those in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) [hereinafter Bates], on the grounds that Bates involved only price advertising by lawyers in newspapers while Section 5.09(a) prohibited price advertising by optometrists in any media,2 the State has elected not to burden this Court with an appeal of the constitutionality of Section 5.09(a). Since Appellants have not appealed the lower court's holding that Section 5.09(a), as a blanket suppression of truthful price advertising, violates the first amendment, optometrists in Texas can now advertise prices of goods and services. On the basis of the State's long experience with regulation of the practice of optometry, however, Appellants believe that

No optometrist shall publish or display, or knowingly cause or permit to be published or displayed by newspaper, radio, television, window display, poster, sign, billboard, or any other advertising media, any statement or advertisement of any price offered or charged by him for any opthalmic services or materials . . . .

This, of course, includes television and radio. This Court held in Bates that "[t]he special problems of advertising on the electronic broadcast media will warrant special consideration. . . . The constitutional issue in this case is only whether the state may prevent the publication in a newspaper of appellants' truthful advertising concerning the availability and terms of routine legal services." 433 U.S. at 384.

section 5.13(d), which prohibits the practice of optometry under a trade name, corporate name, assumed name, or any name other than the name under which the optometrist is licensed to practice, is essential to the protection of the public health. Appellants<sup>3</sup> therefore appeal the decision of the court below holding section 5.13(d) unconstitutional. Appellants additionally appeal from the Final Judgment below since the injunction issued does not comply with the requirements of Rule 65(d), Federal Rules of Civil Procedure. For this same reason, the Orders Pendente Lite entered by the court below are being appealed.

This suit was originally filed by Dr. N. J. Rogers, one of six members of the Texas Optometry Board, against the five other members of the Board in August 1975. Dr. Roger's Original Complaint, filed in the Beaumont Division of the Eastern District of Texas, challenged sections 5.13(d), 2.02, and 5.15(e) of the Texas Optometry Act as unconstitutional (App. Vol. I, 8 - 17). The Defendants filed a motion to transfer venue to the Western District of Texas, which was and is the official residence of the Texas Optometry Board. The Court denied Defendants' motion and ruled that venue was proper in Beaumont, Texas, the residence of Appellee Dr. Rogers.

Defendant Board members then filed a motion to dismiss for lack of standing to raise the constitutionality of Section 2.02. They also filed a motion for summary judgment which asserted that Dr. Rogers was estopped from challenging the constitutionality of the Texas

<sup>&</sup>lt;sup>1</sup>Section 5.09(a) reads, in pertinent part, as follows:

<sup>&</sup>lt;sup>3</sup>Since the Appellants are all members of the Texas Optometry Board, an agency of the State of Texas, who have been sued in their official capacity, the Appellants will also be hereinafter referred to as the State for purposes of clarity. Furthermore, the State of Texas is the real party in interest of this suit since the constitutionality of a state statute is at issue.

Optometry Act since he had sponsored it and had procured its enactment (App. Vol. III, 227 - 239).

In January of 1976, five months after the suit was originally filed, the court set the case for trial on the merits for February 20, 1976. The depositions of the defendant Board members, as well as Dr. Rogers's deposition, were taken prior to the February 20 setting. At the time the depositions of these Board members were taken by the Plaintiff, counsel for the Defendants assumed that he could call the Board members to the stand at the time of trial.

On February 17, 1976, three days before the February 20th trial setting, the Texas Senior Citizens Association, represented by the same counsel as Dr. Rogers, filed a motion to intervene on behalf of Plaintiff Dr. Rogers (App. Vol. I, 22 - 39). The Senior Citizens group joined in Dr. Rogers's Complaint and also raised, for the first time in the lawsuit, the constitutionality of Section 5.09(a) of the Act, which prohibited price advertising by optometrists. On February 18, 1976, Judge Fisher denied the Senior Citizens' motion to intervene.

At the February 20, 1976 trial setting, the three-judge court instructed the parties that no live testimony would be heard that day, but that counsel would be allowed to present their arguments as to the merits of the case. The court further stated that all evidence would be presented through depositions and other discovery procedures, as opposed to live testimony. The court indicated that they would read the discovery instruments necessary to a proper determination of the issues. With the exception of the three hour hearing held on February 20, 1976, there were no further oral hearings, testimony, or arguments presented to the three judge panel.

On April 9, 1976, after the discovery had been completed pursuant to the court's discovery schedule and three weeks prior to the deadline for filing briefs on the merits, the Texas Senior Citizens Association renewed their previous motion to intervene without citing any additional authority as to why it should be granted (App. Vol. I, 40-42). Defendants objected to this motion on the grounds that it was not timely, had previously been denied, and that it prejudiced the Defendants. On June 11, 1976, the court entered an order granting the Senior Citizens' intervention. Thus, the Senior Citizens were allowed to intervene after the majority of the evidence had been adduced. This intervention meant that even if the court granted Defendants' motion to dismiss for lack of standing on the part of Dr. Rogers and motion for summary judgment, the suit would still be maintained by the Senior Citizens as to Section 5.13(d). For these reasons, Defendants have not raised these points on appeal with regard to section 5.13(d) even though the motions were overruled by the court below.

On September 13, 1976, the court entered another order granting leave to the Texas Optometric Association to intervene as a defendant (App. Vol. I, 46-47). After the record had been closed and briefs had been filed by the parties, several attempts were made by optometrists in the State to intervene as plaintiffs. These optometrists attempted to intervene only so that they could seek an exemption from the prohibitions of Section 5.13(d) of the Act. Although the court denied each of these optometrists' request for leave to intervene, the court nevertheless entered orders pendente lite exempting these optometrists from "the prohibitions of Section 5.13(d) and like 'trade name' prohibitions of the Texas Optometry Act." (Jurisdictional Statement, A-21 through A-22).

Approximately one year after the record in this case was closed and submitted to the court below, a Memorandum Opinion was issued which upheld sections 2.02 and 5.15(e), and struck down sections 5.13(d) and 5.09(a) as violative of the first amendment. The Court directed counsel to prepare an order in accordance with the Opinion.

The original proposed final judgment submitted by the Plaintiffs ordered that Defendants be "restrained and enjoined from enforcing or attempting to enforce Article 4552 - 5.13(d)" and contained no other language with regard to the issue of trade name prohibition (App. Vol. I, 50-51). Defendants objected to the proposed final judgment primarily on the basis that it was incomplete since it did not specifically upheld sections 2.02 and 5.15(e) (App. Vol. I, 52-58). Plaintiffs then submitted a second proposed final judgment in which, for the first time, they requested that section 5.11 be declared unconstitutional and that Defendants be enjoined from enforcing section 5.13(d) or "any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under trade name." Defendants, of course, vehemently objected to Plaintiffs' attempt to include a section of the statute in the final judgment that was not before the court (App. Vol. I, 59-68). Defendants also objected to the broad language proposed by Plaintiffs that would enjoin the enforcement of "any. . . provision of the Texas Optometry Act which prohibits in any way the practice of optometry under a trade name" on the basis that such language went beyond the scope of the pleadings and was too vague and overbroad. Although Defendants suggested that a hearing be held at which time the court could hear testimony as to the need to include this broad language in the final judgment, (App. Vol. I, 69-70), the court included the language at the request of Plaintiffs without any hearing. The Final Judgment was entered on October 27, 1977, and all parties filed notices of appeal to the United States Supreme Court.

Defendants' fears regarding the potential problems with the broad language contained in the Final Judgment quickly became a reality. Shortly after the entry of the Final Judgment, the Optometry Board had a meeting at which they discussed the fact that one of Dr. Rogers's optometric offices was in violation of section 5.11 of the Act. Dr. Rogers informed the Board members that section 5.11 was unenforceable under the broad language contained in paragraph two of the Final Judgment since he contended that it prohibited the practice of optometry under a trade name. Dr. Rogers further informed the Board that if any attempts were made to enforce section 5.11 of the Act, he might seek to hold the Board members in contempt of the Final Judgment.

After discussing the matter at several Board meetings with their attorneys, the Board wrote Dr. Rogers and requested that he remove a display of frames from the window of one of his optometric offices since the display violated section 5.11 of the Act. Dr. Rogers refused to voluntarily comply with this request. After being assured by their attorneys that section 5.11 was not at issue or before the court in the instant suit either in the court below or on appeal, the Board requested that the Attorney General's Office enforce section 5.11 at the office in question in whatever manner and at whatever time the Attorney General of Texas deemed appropriate.

Before this request had even been received by the Attorney General from the Optometry Board, Dr. Rogers filed a motion seeking to hold the Board members in contempt of the court's Final Judgment. Dr. Rogers contended, in an affidavit, that the Board members had violated the language of the Final

Judgment on appeal in this Court as well as the portion of the Final Judgment enjoining the enforcement of 5.09(a). Dr. Rogers further requested that additional injunctions be issued by the district court. Before the Board members had an opportunity to respond to this motion, one of the district judges entered an order requiring four of five defendant Board members to appear on June 2, 1978, and show cause why they should not be held in contempt of the court's Final Judgment and why additional injunctions should not be issued. The Board members immediately applied to the district court for an order staying the enforcement of paragraph two of the Final Judgment and staying any contempt proceedings pending a final determination of this case on appeal. Both motions were denied. The Board members then filed an application for stay in this Court.4 and the June 2, 1978 contempt hearing was postponed by the district court to allow Justice Powell ample time to review the matter. As of the time this brief was printed, no action had been taken on the application for stay.

#### SUMMARY OF ARGUMENT

A. The three-judge court below erroneously held that section 5.13(d) was unconstitutional under the first amendment as an unwarranted restriction on the free flow of commercial information. The lower court summarily relied on Bates v. State Bar of Arizona, 433 U.S. 350 (1977) and Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976) [hereinafter Virginia], as being dispositive of the issues in the instant suit, and thus failed to sufficiently analyze the facts and the applicable authorities.

Section 5.13(d) provides that an optometrist must practice under his own name and not under an assumed name; it does not prohibit him from advertising. There is no provision in the Act to prohibit an optometrist from advertising any truthful information that he wishes to advertise, including the price of goods and services, as long as he advertises in his own name. The most significant effect section 5.13(d) might have on advertising is that it would require an advertising optometrist to reveal his true identity to the public. The statute requires only that an optometrist practice out in the open under his own name. Section 5.13(d) was created to provide the public with complete information about the identity of the doctor performing health care services. The public receives more information when the optometrist must practice and advertise under his own name. The Bates decision does not mandate that section 5.13(d) is unconstitutional; rather, Bates recognizes the need for laws which insure that the public is as fully informed as possible.

In the instant case, the State presented evidence that the control over individual optometrists by the trade name owner, the volume of patients each doctor is encouraged to see in a trade name practice, the eroding of the doctor-patient relationship, and the pressures to accept inferior lab work from optical companies with ties to the trade name owner, increase the likelihood that patients who patronize optometrists practicing under a trade name will receive poor quality health care.

Furthermore, section 5.13(d) is constitutional as a regulation of conduct which is based upon legitimate and important state interests. By applying the first amendment to regulations of conduct rather than expression, the court below has intruded upon the State's well recognized authority to protect its citizens through rational regulation of its health care

<sup>&</sup>lt;sup>4</sup>For a more detailed discussion see the Application for Stay and related exhibits filed in this Court, in 77-1163, on May 30, 1978.

professions. It is difficult to perceive the limits of a ruling which holds that a mode of business organization, which has been prohibited by the State, conveys "commercial information." Any restriction upon first amendment rights is incidental and does not significantly restrict the flow of information. Even if any information is indeed restricted under section 5.13(d), the statute should be upheld as a reasonable restriction upon the manner of expression.

The lower court included the use of a trade name within the protective fold of advertising by reasoning that "people identify the name with a certain quality of service and goods, the end result being that eventually the name itself calls public attention to the product" (Jurisdictional Statement, A-10). The lower court's reliance upon first amendment protection of information concerning quality of services ignores this Court's statements in *Bates* and requires reversal of the result reached by the lower court in its application of the balancing test.

B. The injunction issued by the court below enjoins Appellants from enforcing section 5.13(d) or "any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name." This language violates Rule 65(d), Federal Rules of Civil Procedure, because it is too vague, too overbroad, and it enjoins the enforcement of unidentifiable provisions of the statute not before the court. Appellants have already been ordered by the lower court to appear and show cause why they should not be held in contempt of this language. As this Court held in Schmidt v. Lessard, 414 U.S. 473 (1974), "[s]ince an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." 414 U.S. at 476. The order in this case, just as in *Schmidt*, is not specific in terms and does not describe in reasonable detail what acts are enjoined. Consequently, that portion of the Final Judgment should be vacated for the same reasons the order in *Schmidt* was vacated.

#### ARGUMENT AND AUTHORITIES

I. THE LOWER COURT ERRED IN RULING THAT THE PROHIBITION OF PRACTICE UNDER A TRADE NAME IS VIOLATIVE OF THE FIRST AMENDMENT

#### A. GENERALLY

1. The Statute and its History

The prohibition of the practice of optometry under a trade name was originally adopted by the Optometry Board in 1959 as a part of the Professional Responsibility Rule. This action was taken subsequent to the overwhelming vote (542 to 31) of optometrists licensed in Texas (Deposition of Dr. N. J. Rogers taken April 6, 1976 [hereinafter Rogers II] at Exhibit 9). The purpose of the "Professional Responsibility Rule" was to emphasize professional responsibility on the part of the doctor, foster the doctor-patient relationship, and promote high quality patient care (App. 207-208). Appellee Dr. Rogers, together with his brother and another trade name owner, filed suit challenging the Rule. After extensive testimony, the Rule was upheld on the basis that the use of trade name by optometrists had been abused to the detriment of the public. Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex. 1967), cert. denied, 389 U.S. 52 (1967) [hereinafter Carp].

Appellees alleged in their motion to affirm at page 13 that Appellants had "scrupulously omitted. . . several

significant items" in their Jurisdictional Statement of which this Court should be aware. Appellees then stated that the Professional Responsibility Rule was repealed by the Board prior to the 1969 legislative session. Appellees, however, have failed to state the circumstances surrounding this purported repeal of the Rule.

In 1967, there was a period of time in which appellee Dr. Rogers was elected President of the Optometry Board at a meeting at which a quorum was not present5 (Rogers Dep. II at Exhibit 2). At that time the Board's administrative rules provided that the president of the Board could submit matters requiring action by the Board in the interim between meetings to a mail ballot of all Board members. In August of 1967, Dr. Rogers caused a purported mail ballot to be sent out on the question of whether the Professional Responsibility Rule should be repealed. Only the three members who had been at the meeting at which Dr. Rogers had been elected President voted on the mail ballot, with all three voting for the repeal of the Professional Responsibility Rule (Rogers Dep. II at Exhibit 3). Mr. Thomas Gee, the Board's attorney, concluded that this attempt to repeal the Rule was not valid since no member other than a duly elected president or vice-president had the authority to determine upon and make a mail submission. Mr. Gee concluded that the Rule was still in full effect and had not been validly repealed (Rogers Dep.II at Exhibit 6). Dr. Rogers refused to accept this determination by the Board's attorney and so informed all optometrists (Rogers Dep. II at Exhibit 8).

When the Legislature convened in 1969, the nominations of the two Board members who had elected

Dr. Rogers and voted for the repeal of the Professional Responsibility Rule were rejected by the Legislature (Rogers Dep. II at Exhibits 10, 11). Representatives from the optometric profession conferred with various state legislators with a view towards adopting a new optometry act. The committee of optometrists, which included Appellee Dr. Rogers, agreed to submit certain matters in controversy to an arbitrator and to be bound by his determination. The end result was the codification of the Professional Responsibility Rule by the Legislature in 1969.7

## 2. The Memorandum Opinion of the Court Below

The lower court offered two justifications for its holding that section 5.13(d) violated the first amendment. First, a trade name is encompassed within the meaning of advertising since trade names call public attention to the product: "people identify the name with a certain quality of service and goods" (Jurisdictional Statement, A-10). Second, the use of a trade name is protected "as part of the consuming public's right to valuable information. . .as to certain standards and quality and availability of particular routine services" (Jurisdictional Statement, A-10). In reliance upon Bates and Virginia, supra, the lower court held Section 5.13(d) violative of the first amendment. In so doing, the court failed to analyze sufficiently both the facts of the case at bar and the applicable authorities. Section 5.13(d) is constitutional as a regulation of conduct which is based upon legitimate and important state interests. Any

<sup>&</sup>lt;sup>5</sup>Three members, including Dr. Rogers, were present. The statute required four members of the Board to constitute a quorum for the transaction of business.

<sup>&</sup>lt;sup>6</sup>Members of the Legislature were aware of the attempted repeal of the Rule (App. Vol. III, 236-237).

<sup>&</sup>lt;sup>7</sup>Compare Rogers Dep. II, Exhibit 9 with Article 4552-5.13, TEX. REV. CIV. STAT. ANN.

restriction upon first amendment rights is incidental and does not significantly restrict the flow of information. Furthermore, Section 5.13(d) should be upheld as a reasonable restriction upon the manner of expression.

There is no doubt that Section 5.13(d) is not violative of the equal protection clause or the due process clause of the fourteenth amendment. The State has clearly satisfied the requirements of the Constitution that its regulation of the optometric profession be rationally related to the public welfare. Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Carp, supra; South Carolina Board of Examiners in Optometry v. Cohen, 180 S.E.2d 650 (S.C. 1971); See City of New Orleans v. Duke, 427 U.S. 297 (1976); Matthews v. Lucas, 427 U.S. 495 (1976). The issue thus becomes whether this otherwise valid restriction upon the conduct of a licensee is violative of the first amendment.

The court below purportedly relied on Bates and Virginia but ignored both the language of those decisions and other applicable rulings of this Court. In Bates and Virginia, this Court was dealing with statutes which were directed at expression alone; the asserted protection of the public welfare was "protection based in large part on public ignorance." Virginia, supra at 769. Since "[t]he advertising ban [did] not directly affect professional standards one way or another," the states involved were clearly suppressing information based on its content. Virginia, supra at 769. See also Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977). Neither Bates nor Virginia involved a statute such as Section 5.13(d), which regulates conduct and which affects freedom of expression only incidentally as a restriction upon manner, not content.

Appellees contend that the district court found, as a matter of fact, that "a trade name is encompassed within

the meaning of advertising" and that "the Texas State Optical name [TSO] has come to communicate standards of price and quality, and availability of particular routine services." Appellees further argue that nowhere in their Jurisdictional Statement did Appellants attack the trial court's factual findings as clearly erroneous (Motion to Affirm at 17-18). However, the constitutionality of a statute is a question of law, not one of fact. The lower court balanced the competing interests involved and ruled that Appellees' arguments were more persuasive. The court set out the arguments proposed by Appellees to include trade names within the protective fold of advertising, then set out Appellees' arguments as to why there is a first amendment right to use a trade name as part of the consuming public's right to valuable information. The court found that both arguments were persuasive and that, in applying the rationale of the advertising cases to the trade name question, the blanket suppression of the use of trade names resulted in an unwarranted restriction of the free flow of commercial information. The court's holding was based on questions of law, and did not comprise findings of fact by the court. The court applied legal analysis to the facts presented by all the parties and held, as a matter of law, that 5.13(d) violated the first amendment.

Even assuming there was an underlying fact finding by the lower court<sup>8</sup> that "TSO has come to communicate to the consuming public information as to certain standards of price and quality, and availability of

<sup>&</sup>lt;sup>8</sup>Appellee contends that the instant case applies only to TSO and bears no significance beyond the immediate parties. He states that if a party is unable to show that his trade name conveys valuable information to the public, he will have no standing to pursue a cause of action (Motion to Affirm, page 10,n.11). Under this analysis, each optometrist wishing to practice under a trade name would have to file his or her own lawsuit.

particular routine services," there is no evidence in the record to support such a finding. Therefore, any such finding by the court would have no support in the evidence and would be clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure.

#### B. THE LOWER COURT ERRED BY APPLYING THE FIRST AMENDMENT BALANCING TEST

The lower court erred in applying the first amendment to test the constitutionality of section 5.13(d), since that section of the Act prohibits conduct, not speech. The practice of optometry in Texas under a trade name is more than just a means of identification, it connotes an entire manner of practicing optometry. This mode of practicing, more often than not, includes a high volume practice which tends to lead toward poor quality patient care (App. Vol. II, 101-164). The Supreme Court of Texas found that the conduct associated with the practice of optometry under a trade name was detrimental to the public.

[T]he trade or assumed name practice, like feesplitting, disrupts the optometrist-patient relationship by concealing the identity and burying the responsibility of the licensed optometrist.... Dr. Carp operates seventy-one offices in Texas. He advertises them under the following [ten] trade names. . . . From time to time he adds, drops, or changes the trade name at a particular office although the licensed optometrists employed in that office remain the same. He has purchased and practices under their name although they are no longer associated with the respective offices in any manner. Illustrative of Dr. Carp's trade or assumed name practices is the situation that exists in Wichita Falls. Within a two-block area

in that city, Dr. Carp maintains offices operated under the names of Mast Optical, Luck Optical, and Lee Optical. The same supervisor oversees these three offices. Each office dispenses the same optical goods and services and uses the same kind of equipment. Optometrists are shifted from one location to the other. Dr. Carp's advertising represents to the public that these three offices are in competition with each other thereby creating the false impression that they are each independently owned and operated. Similar situations exist in Dallas and El Paso. . . .

The practice of optometry under a trade name is holding out to the public that the trade name is licensed. The result is that the identity of the licensed practicing optometrists is hidden behind the unlicensed trade name. Prescriptions belong to those operating the trade name business rather than the prescribing optometrist. The practice is confusing and misleading to the public. [Emphasis added.]

Carp, 412 S.W.2d at 311-13.

Pursuant to the Texas Supreme Court's determination in Carp, the Legislature enacted section 5.13(d) which prohibits the practice of optometry under a trade name. Any restriction upon the advertising of a trade name is incidental to a prohibition of conduct. In Pittsburg Press Co. v. Pittsburg Commission on Human Reations, 413 U.S. 376, 389 (1973), this Court stated that a first amendment interest is "altogether absent when the commercial activity itsef is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." See Bates, 433 U.S. at

384; California v. LaRue, 409 U.S. 109 (1972). Similarly, the first amendment "does not remove a business engaged in the communication of information from general laws regulating business practices." Savage v. Commodity Futures Trading Commission, 548 F.2d 192, 197 (7th Cir. 1977); See also Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967) (opinion of Harlan, J.); Beneficial Corporation v. Federal Trade Commission, 542 F.2d 611 (3rd Cir. 1976), cert. denied, 430 U.S. 983 (1977). However, Appellee Dr. Rogers after years of effort to avoid a regulation of business conduct held valid by the Supreme Court of Texas, now asserts that, since the conduct expresses "commercial information," the State cannot prohibit it.

In Pittsburg Press Co., supra, this Court held that a state need not permit advertising of illegal commercial activity; the ruling of the court below is that a state may not make a commercial activity illegal because it cannot then be advertised. The lower court's holding is an unwarranted and unwise extension of the rulings in Bates and Virginia and significantly intrudes upon the state's power to regulate its health care professions for the public welfare. A state should be allowed to regulate professional conduct without violating the first amendment when the regulation at issue concerns conduct and does not restrict content of expression. In this context the first amendment interest is "altogether absent." Pittsburg Press Co., 413 U.S. at 389. This Court should reverse the lower court's ruling and make clear that Bates and Virginia do not disturb the state's longprotected power to regulate businesses, including the conduct of its licensed professionals. See North Dakota State Board of Pharmacy v. Synder's Drug Store. Inc., 414 U.S. 156 (1973); Williamson v. Lee Optical Co., supra; West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

## C. THE LOWER COURT ERRED IN ITS APPLICATION OF THE BALANCING TEST

The lack of a cognizable first amendment interest mandates reversal of the lower court's ruling. However, even applying those cases which concern a mixture of conduct and expression, the balance weighs in favor of the State.

The applicable standard upon which to review a regulation of conduct which incidentally affects freedom of expression is stated in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

See also Buckley v. Valeo, 424 U.S. 1 (1976); Younger v. Harris, 401 U.S 38, 51 (1971); Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976).

The restriction upon "alleged First Amendment freedoms" in the instant case is certainly incidental. The communication which the lower court viewed as

protected was information concerning a "certain quality of service and goods" and information "as to certain standards and quality and availability of particular routine services" (Jurisdictional Statement at A-10). The reference to goods is inapposite to this case. Opticians, who are not licensed in Texas, market goods and are permitted to practice under a trade name and advertise prices. Information concerning "quality of service" is of little value to the public; the quality of service varies with the skill and judgment of each optometrist. In Bates this Court noted that advertising claims as to the quality of services may be so likely to be misleading as to warrant restriction. 433 U.S. at 366. See Bates, 433 U.S. at 386 (opinion of Burger, J.), 400 (opinion of Powell, J.). These references were to information concerning the quality of an individual practitioner. To the extent that nondeceptive advertising of "quality of services" by optometrists is possible, it is not prohibited by the State. The only restriction in this regard is that, since practice under a trade name is prohibited, a trade name may not be used to advertise the quality of services of possibly hundreds of optometrists. Even if non-deceptive advertising of "quality of services" by an individual is possible, clearly such an advertisement by a trade name proclaiming the quality of hundreds of individuals would be deceptive per se. Thus the lower court's holding that this "quality of service" information is protected by the first amendment goes farther than this Court was expressly unwilling to go in Bates. Since this case is on the appellate docket, the lower court's holding must be reversed in order to prevent its use as precedent. See Hicks v. Miranda, 422 U.S. 332, 344 (1975).

Information concerning the "availability of particular routine services" is admittedly of some value to consumers; however, the lower court referred to no evidence which indicates that the public is presently

deprived of such information. In fact, even before the lower court held the price advertising restriction of section 5.09(a) unconstitutional, optometrists were allowed to advertise information concerning their location, their hours, their specialty, the number of associates they employ, or any other truthful information that they wished to advertise. Without the prohibition of section 5.09(a), a consumer now has access to direct information concerning the price of goods and services; the communication of such information by means other than a trade name is not prohibited.

The availability of this information illustrates the negligible impact of section 5.13(d) on the free flow of commercial information. The prohibition does not restrict content of communication; it does not prevent an optometrist from directly advertising his services or even the quality thereof. What it does is prevent the use of a trade name, which Appellees argue is the most effective means of communication. Leaving aside doubts concerning the inherent inaccuracy of a trade name advertisement for the services of hundreds of practitioners, a "government is [not] compelled to permit the most effective means of expression chosen by the citizen." Vietnam Veterans Against the War v. Morton, 506 F.2d 53, 58 n. 14 (D.C. Cir. 1974). Section 5.13(d) "leaves open to the disputants other traditional modes of communication." Carpenters Union v. Ritter's Cafe, 315 U.S. 722, 728 (1942).

#### 1. The Justifications For The Prohibition

To justify the need for the negligible restriction upon expression involved in section 5.13(d), the State presented compelling evidence of the importance of its interests in prohibiting practice under a trade name. As discussed in the above Statement of the Case, this is not a new problem to the State. In *Carp* the Texas Supreme Court upheld the trade name prohibition in its earlier

form as a board rule and cited abundant authority for its holding. 412 S.W.2d at 312. In the instant case, several witnesses, including a former partner of Dr. Carp. testified that patient care suffers in a trade name optometric practice (App. Vol. II, 101-164). The nature of a trade name optometric practice was explained by Dr. Robert Shannon, a former part-owner in a chain optical company. Dr. Shannon's testimony showed that certain evils are more prevalent in a trade name practice than in a situation where an optometrist practices under his own name. These evils include excessive control over individual optometrists by owners of the trade name (App. Vol. I. 71-98), an emphasis on volume rather than quality in patient care (App. Vol. II, 107, 123-131), the erosion of the doctorpatient relationship (App. Vol. II, 112-113), and pressures on the optometrist to accept inferior lab work from optical companies with ties to the owner of the trade name (App. Vol. II, 114). Furthermore, the testimony given in this case showed the damage to a patient that could result when an optometrist improperly performs an eye examination (Deposition of Dr. Nelson Waldman at 22-30). The likelihood that necessary steps in an examination will be omitted is increased when optometrists are under time and volume pressures (App. Vol. III, 308-312). A trade name practice tends to put optometrists under precisely such pressures (App. Vol. II, 138-139).

Section 5.13(d) was also created to provide the public with complete information about the identity of the doctor performing health care services. The public receives *more* information because of section 5.13(d) than they would receive without the trade name prohibition. When an optometrist must practice under his own name, and not hide behind the anonymity of an

assumed name, the patient knows the name of the responsible optometrist. If that patient goes to another optometrist at some future time, the patient is more likely to be able to tell the second optometrist the name of the doctor who previously examined his eyes (App. Vol. II, 112). Transferability of records from one doctor to another is promoted when the patient remembers the name of his previous doctor. If a patient, on the other, visits one of the myriad of TSO offices in the State of Texas, he is more likely to forget, if in fact he ever knew, the name of the doctor who examined him. The office door will say "TSO," the phone will be answered "TSO," and the patient will more than likely know only that he had his eyes examined at TSO.

The State also has an interest in insuring that optometrists do not easily abandon a bad reputation. When an optometrist must practice under the name in which he has been licensed, he will, over the course of his professional career, develop a reputation. Whether this reputation is good or bad, it will follow him throughout his career since, wherever he practices, he must practice under the name in which he has been licensed. If optometrists are permitted to practice under assumed names, they may, in effect, abandon a bad reputation. By requiring an optometrist to practice in his own name, it is likely that the consuming public will be made aware of a particular optometrist's reputation for competence (App. Vol. II, 113).

The State further has an interest in promoting the doctor-patient relationship. This relationship is strengthened when the patient knows the identity of the optometrist treating him. He is more likely to go back to that same optometrist if he is able to develop a personal relationship. The testimony shows that there is little time for developing a doctor-patient relationship in a trade name practice (App. Vol. II, 112-113).

By requiring an optometrist to practice under his own name, the State is giving the public easier access to the name of the responsible optometrist and to the complete reputation of the optometrist. Such information is more truthful and more valuable than that which would be conveyed by a fictitious name. The *Bates* decision does not mandate that section 5.13(d) is unconstitutional; rather, *Bates* recognizes the need for laws which insure the public is as fully informed as possible.

#### 2. The Nature Of Information Conveyed

The deceptive nature of a multi-office trade name optometric practice as well as the damages to the public health incident thereto led the state to prohibit practice under a trade name. Contrary to Appellees' rhetoric, the use of a trade name is a merchandising method aimed at securing a large volume business through trade name advertisement. In Williamson v. Lee Optical Co., 348 U.S. 490 (1955), this Court stated:

We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers.

Id. at 490. Appellees assert and the lower court apparently agreed that the recent commercial speech cases have effectively eroded this statement. The error in this view is basic. Bates and Virginia were decided on the basis of the consumer's right to factual information regarding prices. The effectiveness of any merchandising method and its resultant value to the

seller are not relevant to a first amendment analysis. The issues consist of the nature of the information, the degree of first amendment protection, and the interest of the State in mitigation thereof.

In Virginia, the information sought to be repressed consisted of the price of prescription drugs -- a product. This was purely factual information which had no direct relationship to the technical practice or business organization of pharmacists. While price advertising is a merchandising method, the Court saw importance only in the nature of the information involved and its utility to the consuming public. The Court further found the State's interest to be inadequate to justify the restriction, noting that price advertising had not been shown to affect the actual practice of a pharmacist. In light of the uniformity of pharmaceutical products, there was no showing that the public health could reasonably be endangered by price advertising or a resultant volume operation. Similarly, Bates involved only price advertising of "routine" services. It did not extend first amendment protection to all merchandising methods. The Court carefully examined the nature of the communication and the interest of the state in prohibiting it. In both Bates and Virginia, the Court relied heavily on the absolute prohibition of the content of the communication and noted that reasonable time, place, and manner restrictions might be proper. 433 U.S. at 384.

Section 5.13(d) may be viewed as a valid restriction on the manner of expression. This Court has often approved restrictions of this kind, provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that they leave open ample alternative channels for communication of the

<sup>&</sup>lt;sup>9</sup>Appellee's arguments regarding the value of the trade name to its owner are relevant only in that they demonstrate that the use of a trade name is a merchandising method commonly used in selling fungible products (Motion to Affirm at 46-52). That trade names may be protected by law from appropriation has nothing to do with the question of whether the first amendment protects their use.

information. Virginia, supra at 771; Bates, 433 U.S. at 384; Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Breard v. Alexandria, 341 U.S. 622 (1951). The lower court impliedly recognized that a trade name in itself is meaningless by stating that the information communicated concerned quality and availability of services. The State has placed no other restrictions on communication of this information other than to prohibit deception. The justification for the prohibition here is totally independent from the content of the information allegedly communicated by a trade name; the interest served is among the most significantprotection of public health; and ample altermative channels are left open, including direct advertisement of the information itself. When one views the direct prohibitions upon communication which have been upheld by the federal courts, it would seem anomalous for a statute, which only restricts one manner of communication incident to the protection of public health, to be held violative of the first amendment. See Pittsburg Press Co. v. Pittsburg Commission on Human Relations, supra; Carpenters Union v. Ritter's Cafe. supra; Savage v. Commodity Futures Trading Commission, supra; Beneficial Corp. v. Federal Trading Commission, supra; Mitchell v. King, 537 F.2d 385 (10th Cir. 1976). Certainly the State should be allowed to implement a "prophylactic solution instead of one that would have required its own personnel" to attempt the awesome task of insuring that doctors of optometry do not submit to the inherent pressures of a trade name practice to the detriment of their patients. California v. LaRue, 409 U.S. 109, 116; Bates, 433 U.S. at 387 (opinion of Burger, J.), 396 (opinion of Powell, J.). In any event, the primary evils of trade names coupled with the resultant state policy in favor of practice under the licensed name, are sufficient to justify the minimal restriction upon expression.

This case, unlike Bates or Virginia, involves a regulation directly aimed at maintaining high professional standards of practice. This Court has long deferred to states in the regulation of practice of the professions for "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975), citing United States v. Oregon State Medical Society, 343 U.S. 326, 336 (1952). The lower court erred in overbalancing a negligible restriction upon the flow of "commercial information" against the interest of the State in maintaining high quality health care. The lower court failed to recognize that "a different degree of protection is necessary" in the commercial speech context. Virginia, supra at 771 n. 24; Bates, supra 433 U.S. at 384; See also Bigelow v. Virginia, 421 U.S. 809, 826 (1975).

# II. THE INJUNCTION AND ORDERS PENDENTE LITE ENTERED BY THE COURT SHOULD BE VACATED BECAUSE THEY ARE OVERBROAD

Paragraph 2 of the Final Judgment issued by the district court enjoins Appellants from enforcing section 5.13(d) of the Texas Optometry Act in the following language:

Section 5.13(d) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared unconstitutional under the First Amendment of the United States Constitution insofar as it provides that "[n]o optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name or any name other than the name under which he is licensed to practice optometry in Texas." Members of the Texas

Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same, or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name. [emphasis added].

(Jurisdictional Statement at A-3). The only trade name provision raised by the pleadings or litigated by the parties was section 5.13(d). Furthermore, in its Memorandum Opinion, the court did not discuss or even make reference to any other provision of Act which prohibits in any way the practice of optometry under a trade name. Under the requirements of Rule 65(d), Federal Rules of Civil Procedure, every order granting an injunction and every restraining order must set forth the reasons for its issuance, must be specific in terms, and must describe in reasonable detail, without reference to the complaint or other documents, the acts sought to be restrained. The injunction issued by the court below is deficient in all these respects.

In United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 581 (1971), this Court stated that an injunction decree must relate "specifically and exclusively to the pleadings and the proof." In the instant case, the Appellee's complaint challenged only section 5.13(d) as prohibiting the practice of optometry under a trade name. Appellants were never apprised at any time during the trial of this cause that any "other provisions" were being challenged. Rather, the first indication that the enforcement of other provisions of the Act not raised in the pleadings was sought to be enjoined was contained in Appellee's second proposed final judgment filed with the court subsequent to the court's issuance of the Memorandum Opinion.

It is fundamental that relief granted by the court in any proceeding must be within "the framework of the pleadings [and] the evidence." Korematsu v. United States, 323 U.S. 214, 222, (1944) [hereinafter Korematsul, See Solesbee v. Balkcom, 339 U.S. 9, 11 (1950). Korematsu is not, as Appellees contended in their Motion to Affirm, a case in which the lower court framed an overbroad decree which had the effect of invading constitutionally protected rights. Rather, this Court was asked to pass upon constitutional questions not contained within the framework of the pleadings and the evidence and which went beyond the issues raised at trial. In the instant case, the court below passed on issues that were not litigated at trial. It deviated from the established policy of considering only those issues necessarily raised by the record. In one very ambiguous and vague sentence the district court has, in effect, enjoined the Texas Optometry Board from enforcing valid provisions of the Act, without specifying, in the Final Judgment or otherwise, which provisions are enjoined. Appellees presented no evidence to show that any provisions of the Act, other than section 5.13(d), in any way prohibit the practice of optometry under a trade name; Appellants were never given an opportunity to defend against such unalleged contentions. The only provisions at issue in the suit were sections 2.02, 5.13(d), 5.09(a) and 5.15(e).

Appellees contend that the issue of "other provisions" was tried by consent. However, even under a liberal application of Rules 15(b) and 54(c), this assertion is totally without merit. No court has ever held that a State had defended the constitutionality of a statute by consent when the State was never apprised of which statute was being attacked. If Appellees' reasoning is extended to its extreme limits, sections of the statute which Appellees contend prohibit the practice of optometry under a trade name in any way would be unenforceable even if the main purpose of the statute was unrelated to practice of optometry under a trade

name. This could include sections of the statute designed to protect the public, such as the second part of section 5.09(a) which prohibits misleading advertising or section 5.08 which prohibits optometrists from practicing while suffering from a contagious disease. Although these statutes affect all optometrists by restricting their practice for the protection of the public, an optometrist practicing under a trade name could argue that they not be enforced because they in some way restrict his practic of optometry under a trade name.

Section 5.13(d) was the only provision attacked as a "trade name" provision. The inclusion of other trade name provisions in the Final Judgment was prejudicial to Appellants. If other provisions had been challenged in the pleadings, Appellants would have had an opportunity to demonstrate that these provisions did not have the effect of prohibiting the practice of optometry under a trade name. As it stands now, Appellants will have this opportunity only at a contempt proceeding. Appellants were deprived of their day in court on this issue. Also, if these "other provisions" had been litigated. Appellants would know which sections of the statute they are now enjoined from enforcing; they would not have the threat of a contempt proceeding held over their head when they attempted to enforce valid provisions of the Act (see Statement of the Case above and Application for Stay filed in this cause on May 30, 1978).

In Schmidt v. Lessard, 414 U.S. 473 (1974) [hereinafter Schmidt], plaintiff challenged the constitutionality of Wisconsin's involuntary commitment laws. The district court held generally that the statutory scheme was unconstitutional and that the plaintiff and her class were entitled to injunctive relief.

This Court held that the order failed to satisfy the second and third clauses of Rule 65(d).

[T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. . . . Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.

414 U.S. at 476. The order in this case, just as in *Schmidt*, is not specific in terms and does not describe in reasonable detail what acts are enjoined. Consequently that portion of the Final Judgment should be vacated for the same reasons the order in *Schmidt* was vacated.

In responding to Appellants' Jurisdictional Statement, Appellees have cited no case in which this Court has held it proper to grant relief on issues that were not raised at trial. In Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971, Three-Judge Court), aff'd sub nom Coit v. Green, 92 S.Ct. 564 (1971), the plaintiffs brought suit to enjoin the IRS from according taxexempt status to racially segregated private schools. After the three-judge court had granted a preliminary injunction, the IRS changed its policy, and announced that it would no longer extend tax-exempt status to such schools. The district court agreed with this new construction of the Internal Revenue Code and issued an injunction containing affirmative directives to insure that no racially-segregated school would be classified as tax-exempt. The issue upon which relief was granted had been raised by the parties and considered in litigation. Porter v. Warner Holding Co., 328 U.S. 395

(1946), was a suit for enforcement of the Emergency Price Control Act. The Court held that the statutory provisions for remedies did not impair traditional equity powers, and that the court could go beyond those remedies in framing its decree. It did not hold that a court could go beyond the framework of the pleadings and the evidence. Alexander v. Hillman, 296 U.S. 222 (1935) stands for the basic proposition that a person not a party to an original decree submits himself to the jurisdiction of the court by presenting a counterclaim. The Court held that the trial court should "decide all matters in dispute." 296 U.S. at 242. In this case, the only trade name provision in dispute was section 5.13(d). The court below had no authority to decide other issues not raised by Appellees either in their pleadings or at trial. Only after a Memorandum Opinion had been issued by the court did Appellees realize that they had not asked for in their pleadings nor received in the Opinion all the relief they desired, and only then did they attempt to include broad, nonspecific language in the injunction.

The Texas Optometry Board has been put in the position of having the duty under the laws of the State of Texas to enforce the provisions of the Act, but of not knowing which sections of the Act the Final Judgment enjoins them from enforcing. Furthermore, the possibility of a contempt proceeding has become a reality. In *International Longshoremen's Association*, Local 1291 v. Philadelphia, 389 U.S. 64, 76 (1967), this Court emphasized the importance of Rule 65(d):

The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the Court intends and what it means to forbid.

As set out previously in the Statement of the Case, the Board members have already been cited to appear and show cause why they should not be held in contempt of this broad language of paragraph 2 of the Final Judgment, for attempting to enforce section 5.11 of the Act. This section, which forbids certain types of window displays and signs in an optometric office, restricts activities other than the practice of optometry under a trade name. An optometrist could easily practice optometry under a trade name without violating section 5.11 of the Act. The harm Appellants have suffered from this broad language is not speculative — they face the possibility of being held in contempt of an injunction too vague to be understood.

The strict interpretation of Rule 65(d) is particularly applicable when the actions of a state administrative body are involved. In Gunn v. University Committee to End the War in Viet Nam, 399 U.S. 383, 389, (1970), the Court said that compliance with Rule 65(d) "is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign state." The district court's order in this case threatens to paralyze enforcement of the statutory scheme for regulation of the practice of optometry. The Final Judgment is so vague that any unrelated provision could be construed by the court to fall under the heading of "other provisions." This situation renders the Board unable to effectively carry out its statutory duties. If this case is not reversed on the merits, the Final Judgment should be vacated, and the case remanded to the district court with instructions to limit the scope of the injunction to the issues raised at trial and to set forth specifically which sections of the Act are declared unconstitutional.

During the course of the trial of this cause, the district court issued a number of "Orders Pendente Lite," a representative copy of which has been reproduced in the

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Jurisdictional Statement at A-21 through A-22. These orders exempted specified optometrists, none of whom were parties to this suit, from certain provisions of the Act. The court below had no authority to issue these exemptions to non-parties, and the language in the orders was too broad for all the reasons previously stated with regard to the Final Judgment.

Some of the optometrists named in the orders Pendente Lite had sought leave to intervene. Although intervention was denied by the court below, the court granted the relief these optometrists had sought. thereby granting preliminary relief to persons not parties to the suit. These orders also violated Rule 65(d) because they were, in effect, injunctions issued against the Board to restrain them from enforcing provisions of the Act. Similar to the Final Judgment, the Orders Pendente Lite exempted the named optometrists from the provisions of §5.13(d) and "like trade name prohibitions." These orders suffer the same basic defect as the Final Judgment. The Optometry Board does not know which provisions of the Act it can enforce against these persons. Accordingly, the "Orders Pendente Lite" should be vacated.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below declaring section 5.13(d) of Act to be unconstitutional be reversed, or, in the alternative, that the Final Judgment and/or the Orders Pendente Lite be vacated.

Respectfully submitted,

JOHN L. HILL Attorney General of Texas

DAVID M. KENDALL First Assistant STEVE BICKERSTAFF Assistant Attorney General

DOROTHY PRENGLER Assistant Attorney General

RICHARD ARNETT Assistant Attorney General

P.O. Box 12548, Capitol Station Texas 78711 (512) 475-3131

Attorneys For Appellants In Their Official Capacity

DOROTHY PRENGLER Assistant Attorney General

RICHARD ARNETT Assistant Attorney General

#### CERTIFICATE OF SERVICE

I, Dorothy Prengler, a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Brief for the Appellants have been served on all parties required to be served by placing same in the United States Mail, First Class, Certified and Postage Prepaid on this \_\_\_\_ day of June, 1978, addressed to each of the following:

DAVID M RENDALL

Mr. Robert Q. Keith Attorney at Law 1400 San Jacinto Bldg. Beaumont, Texas 77701 Mr. Larry Niemann Attorney at Law 1210 American Bank Tower Austin, Texas 78701

Mr. John G. Tucker Attorney at Law Beaumont Savings Bldg. 5th Floor Beaumont, Texas 77701

DOROTHY PRENGLER

IN THE

## MICHAEL ROBAK, JR., CLERK

## Supreme Court of the United States

OCTOBER TERM, 1978

Dr. E. RICHARD FRIEDMAN, et al.,
Appellants,

Dr. N. JAY ROGERS, et al.

TEXAS OPTOMETRIC ASSOCIATION, INC., Appellant,

Dr. N. JAY ROGERS, et al.

On Appeal from the United States District Court for the Eastern District of Texas

#### BRIEF FOR APPELLEES

PHILIP ELMAN JERRY D. ANKER ROBERT E. NAGLE JUDITH E. LESSER

> WALD, HARKRADER & ROSS 1320 Nineteenth Street, N.W. Washington, D.C. 20036

ROBERT Q. KEITH
MEHAFFY, WEBER, KEITH
& GONSOULIN
1400 San Jacinto Building
Beaumont, Texas 77701

BRIAN R. DAVIS
DELEON & DAVIS
408 First Federal Plaza
Austin, Texas 78701

Attorneys for Appellees

August 21, 1978

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## In The Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1163

DR. E. RICHARD FRIEDMAN, et al.,
Appellants,

DR. N. JAY ROGERS, et al.

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION, INC.,

Appellant,

Dr. N. JAY ROGERS, et al.

On Appeal from the United States District Court for the Eastern District of Texas

#### BRIEF FOR APPELLEES

#### OPINION BELOW

The opinion of the three-judge district court is reported at 438 F. Supp. 428, and is set out in the appendix to the jurisdictional statement filed by appellants Friedman et al. (A-6 through A-17).

#### JURISDICTION

The judgment of the district court was entered on October 27, 1977. Notices of appeal were filed by appellants Friedman et al. on December 20, 1977, and by the Texas Optometric Association, Inc. on December 22, 1977. The jurisdictional statements were filed on February 16, 1978 and February 21, 1978, respectively. Probable jurisdiction was noted on April 17, 1978, and these two appeals were consolidated with No. 77-1164. The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2101(b).

#### STATUTE INVOLVED

Pertinent provisions of the Texas Optometry Act are in the Statutory Appendix, infra.

#### QUESTIONS PRESENTED

- 1. Whether the provisions of the Texas Optometry Act imposing an absolute ban on the use of any trade name by optometrists, but not by opthalmologists and osteopaths: (a) unconstitutionally restrict the free flow of commercial information in violation of the First and Fourteenth Amendments; and (b) deprive optometrists of the equal protection of the laws in violation of the Fourteenth Amendment.
- 2. Whether it was proper for the district court to enjoin the enforcement not only of the specific provision of the Texas Optometry Act which expressly prohibits the use of a trade name, but also any other provision "which prohibits in any way the practice of optometry under a trade name."

#### STATEMENT

These are two of three consolidated appeals arising out of an action filed on August 25, 1975, by Dr. N. Jay Rogers, a member of the Texas Optometry Board, against the other five Board members, challenging the constitutionality of certain provisions of the Texas Optometry Act, Tex. Rev. Civ. Stat. Art. 4552. The Texas Senior Citizens Association, Port Arthur Chapter, by its president, W. J. Dickinson, intervened as a party plaintiff, and the Texas Optometric Association, Inc., intervened as a party defendant.

The case was decided by the district court on the basis of the pleadings, depositions and other discovery materials, and the written and oral arguments of the parties. The court declared unconstitutional (as an infringement of free speech), and enjoined the enforcement of, two basic provisions of the Texas Optometry Act. Those provisions are:

(1) Section 5.09(a), which makes it unlawful for any optometrist to

publish or display, or knowingly cause or permit to be published or displayed by newspaper, radio, television, window display, poster, sign, billboard, or any other advertising media, any statement or advertisement of any price offered or charged by him for any ophthalmic services or materials . . . .

(2) Section 5.13(d), which prohibits any optometrist from using

in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas . . . .

The district court upheld the constitutionality of section 2.02, which requires that two-thirds of the members of the Texas Optometry Board—which regulates the practice of optometry under the Act—must be members of a state optometric association which is recognized by and affiliated with the American Optometric Association.

In these two appeals—Nos. 77-1163 and 77-1186—the defendant members of the Texas Optometry Board, as well as the intervenor Texas Optometric Association, have appealed from the portion of the district court's judgment invalidating the statutory prohibition of use of trade names. They have not appealed from the portion of the judgment invalidating section 5.09(a), the price advertising prohibition. In No. 77-1164, plaintiffs have appealed from that portion of the judgment upholding the constitutionality of section 2.02 relating to the composition of the Texas Optometry Board.

#### Background

The Texas Optometry Act, enacted in 1969, was a legislative effort to resolve a controversy between two conflicting viewpoints as to how optometry should be practiced. In Texas, as throughout much of the nation, those who refer to themselves as "professional" optometrists oppose the use of any advertising or promotional practices in optometry. This point of view is represented by the Texas Optometric Association ("TOA"), an affiliate of the American Optometric Association ("AOA"). The other viewpoint, held by those whom the "professional" optometrists label "commercial" optometrists (such as appellee Rogers), favors the use of trade names, advertising, and similar practices. (A. 370, 417-20, 425-26.) The differences between these two viewpoints relate solely to the economic aspects of the practice of optometry, and not to the professional quality of care and treatment of patients. (A. 419, 374, 279-80.)

Prior to enactment of the 1969 statute, a prohibition against the use of trade names had been adopted by the

Texas State Board of Examiners in Optometry in 1959, as part of that Board's "Professional Responsibility Rule." That prohibition was held by the Texas Supreme Court to be within the Board's delegated powers. Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex.), cert. denied, 389 U.S. 52 (1967). The prohibition was repealed by the Board in 1967, based upon a mail ballot of its members. The validity of this action was challenged by members of the Texas Optometric Association, but the dispute was never finally resolved. (A. 206-11; Deposition of N. Jay Rogers taken April 6, 1976, at 73-92 (hereafter Rogers Dep. II).)

When the Texas Legislature convened in 1969, representatives of the two opposing factions met with various legislators in an effort to reach a compromise on a new optometry law. The resulting proposal was then adopted by the Legislature as the 1969 Texas Optometry Act (A. 229-33; Deposition of N. Jay Rogers taken January 13, 1976, at 80-81 (hereafter Rogers Dep. I).) Included in the Act was section 5.13(d), absolutely prohibiting the use of any trade name in connection with the practice of optometry.<sup>2</sup>

#### The Evidence Before the District Court

Appellee Rogers has been a licensed optometrist in Texas since 1939, and a member of the Texas Optometry Board for the past 23 years. Together with his associates he operates a large number of optometry offices throughout Texas under the trade name "Texas State Optical" or "TSO". TSO has established certain practices and

<sup>&</sup>lt;sup>1</sup> A further issue in the court below was the constitutionality of section 5.15(e) which prescribes a mandatory colloquy between an optometrist and his patient regarding referral to a dispensing optician. This provision was upheld by the district court and no appeal has been taken from that portion of its decision.

<sup>&</sup>lt;sup>2</sup> Section 5.13(k) of the 1969 Act provides that the effective date of the trade-name prohibition and certain other provisions of the Act is to be delayed with respect to any offices which were under lease as of April 15, 1969, until the expiration of such lease or January 1, 1979, whichever occurs sooner.

<sup>&</sup>lt;sup>3</sup> Appellee and his associates operate more than 100 optometry offices in all. Of these, approximately 65 are currently permitted

policies that are followed at all of its offices and that have come to be associated with its trade name. These include provision of quality optometric service and quality materials at reasonable prices and on credit; re-examinations and continuous adjustments of frames and lenses without additional cost; optometric examinations without prior appointment; complete care at a single office; and —for those who move from one part of the State to another—ready transferability of a patient's records between TSO offices. (Rogers Dep. II, at 144-47.)

The use of the TSO trade name in no way serves to conceal the identity of the particular optometrists practicing in each office. Section 5.01 of the Act expressly requires that the optometrist's license must be displayed "in a conspicuous place" in his office, and section 5.12(b) requires "the optometrist's signature" to appear on each prescription he issues. In addition, TSO's policy is to display each optometrist's name on the door or window of his office. (Rogers Dep. II, at 160-61.)

The evidence showed that "professional" optometrists associated with TOA charge substantially higher fees than "commercial" optometrists. (A. 419-23, 257-60, 261-63, 271-73, 297, 283.) Dr. Rogers testified that the efforts by TOA to prohibit certain "commercial" practices in the field of optometry are intended to eliminate or reduce competition. The net effect of these restrictions, he stated, is to increase the cost of engaging in optometry practice—an increase which is passed on to patients (A. 425-26.) Dr. Rogers also pointed out that ophthalmologists and osteopathic physicians are permitted to practice under trade names. Like optometrists, mem-

bers of these professions conduct ophthalmic examinations, prescribe lenses, and may dispense eye-glasses. (A. 423-24; Rogers Dep. 11, at 140-41.)

The importance of trade names to the public was the subject of expert testimony by Dr. Lee Benham, an economist who has made a number of studies of the impact of advertising and related practices on the price and quality of various health services, including eye care. Dr. Benham testified that knowledge about trade names is "[o]ne of the most valuable assets which individuals have in this large mobile country," since their understanding of the services and prices associated with different trade names permits them to locate goods and services at reasonable prices with substantially lower search costs than would otherwise be the case. He stated that firms "have an enormous incentive to develop and maintain the integrity of the products and services provided under their trade name," since "the entire package they offer is being judged continuously by consumers on the basis of the samples they purchase." (A. 336.) Dr. Benham also noted that consumers have great difficulty in becoming knowledgeable and making judgments about differences in the quality and cost of goods and services offered by optometrists, so that any information they are able to obtain is of great assistance. He testified that restrictions on the use of trade names in optometric practice hinder consumers in making informed choices. When consumers are less informed, prices increase; and higher prices particularly disadvantage the poor and elderly in obtaining eyeglasses. (A. 336-37, 346-47.) Dr. Benham's studies found no evidence that the quality of eye care is lower in states that permit optometrists to use trade names and advertise than in states that do not. (A. 340, 348.)

In attempting to justify the statutory ban on the use of trade names by optometrists, appellants relied heavily

to use the trade name "Texas State Optical," pursuant to the statutory exemption applicable to offices which have leases entered into prior to April 15, 1969. See note 2, supra. The other offices are not subject to this exemption, and therefore are prohibited by the statute from using a trade name.

upon Texas State Board of Examiners in Optometry v. Carp, supra, a decision which preceded by two years enactment of the Texas Optometry Act of 1969. The opinion in that case referred to two instances of misrepresentation to the public—namely, the use by one chain enterprise of a variety of trade names to create the false impression that its different locations were in competition with one another, and the use of the name of one of the owning optometrists at offices where he did not actually practice. See 412 S.W.2d at 311-313.

No evidence whatever was offered by appellants that such abuses were not completely halted by the express prohibition in section 4.04(a)(2) of the Act outlawing false or deceptive practices. Nor did appellants make any effort to show that such deceptive practices could not be corrected short of an absolute ban on trade name usage, or that the use by an optometrist of a trade name is inherently misleading to the public or inconsistent with quality optometric care.

Much of the testimony offered by appellants was directed at other aspects of "commercial" optometric practice, particularly the advertising of optometric services (which, of course, need not necessarily involve the use of a trade name). For example, Dr. Shannon—one of appellants' chief witnesses—testified that the chain optical company in which he had been a partner prior to 1957 relied on advertising to generate a high volume of patients who were seen on a no-appointment basis, and, as a result, that the optometrists employed by his company did not always have sufficient time with each patient to provide a quality examination. (A. 106-07, 125, 142-43.) Referring to practices that had occurred

more than a decade before the 1969 Act became law, he stated that frequently the optometrist in a local office of his company failed to take time personally to check the lenses received from a laboratory to verify that the prescription had been properly compounded, generally leaving that to an unlicensed office assistant. (A. 109-10.) Dr. Shannon admitted that he had no objection to advertising or a high volume of practice "provided that the optometrist is able to give an honest and true service to the patient" (A. 173), and observed that at one time his own organization had provided very fine services, the quality of which began to deteriorate only when it allowed volume and profit to become predominant concerns. (A. 136-37.)

Two of the defendant Board members also admitted that "commercial" optometrists are fully capable of providing proper optometric care and that their dispute with such optometrists was based only upon their business practices. Thus, Dr. Friedman testified that there would be a difference between a "professional" optometrist and a "commercial" optometrist only if the latter were seeing more patients than could be given adequate care, and that he would expect to receive the same proper examination and prescription in Dr. Rogers' office as he would in his own. (A. 373-74.) Similarly, Dr. Mora stated his belief that there is at present no dispute between the two factions over the proper way to examine a patient's eyes or the prescription that should be provided for a particular eye disorder. (A. 279-80.) Their views thus accorded with those of Dr. Rogers, who testified that there is no difference in the quality of service provided to the public by the two groups of optometrists, and that both groups use the same quality of products, provided by the same suppliers and laboratories. (A. 421-22; Rogers Dep. II at 150.)

<sup>&</sup>lt;sup>4</sup> Dr. Shannon acknowledged that the situation improved after the State Board adopted a Basic Competency Rule. This Rule specified the tests that must be performed by an optometrist and had the effect of requiring the optometrists in Dr. Shannon's organization to spend more time with their patients. (A. 128.)

#### The District Court's Decision

Applying the rationale of this Court's recent professional advertising cases, the district court held that "blanket suppression of the use of trade names results in unwarranted restriction of the free flow of commercial information and therefore represents an unconstitutional violation of the first amendment." (Appendix to Jurisdictional Statement of appellants Friedman et al., A-10, 11.)

Rejecting appellants' contention that use of trade names by optometrists would impair the doctor-patient relationship, lead to deterioration of the quality of eye care, and permit the concealment of an optometrist's identity and encourage deception and misrepresentation, the court found appellants' claims to be factually unsupported by the evidence. (*Id.* at A-8.) The court specifically rejected the contention that use of the Texas State Optical name misleads the public as to who is the responsible optometrist. It noted that its ruling "does not prohibit or invalidate regulations having to do with the posting of the optometrists' names present, or the requirement that those optometrists whose names are posted work so many hours per week at their place of business." (*Id.* at A-11 n.3.)

The court accordingly declared section 5.13(d) of the Texas Optometry Act to be unconstitutional insofar as it provides that no optometrist may use "any assumed name, corporate name, trade name or any name other than the name under which he is licensed to practice optometry in Texas," and enjoined the Texas Optometry Board from enforcing that provision "or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name." (Id. at A-3.)

#### SUMMARY OF ARGUMENT

I.

The Texas Optometry Act's blanket ban on the use of trade names by optometrists is an unconstitutional abridgement of their freedom of speech. That commercial speech is protected by the First Amendment has now been firmly established by decisions of this Court. Trade names, like other forms of protected commercial speech, communicate information to the public. They enable consumers more readily to locate, and more intelligently to choose among, providers of goods and services. The trade name "Texas State Optical," which appellee Rogers has adopted, is the only effective means by which appellee can identify to the public the optometry offices which are part of his organization, and at which the particular type and quality of care associated with that trade name are available.

Contrary to the contentions of appellants and the amicus curiae, the trade name prohibition is not a regulation of business conduct, but is a direct restraint on commercial communication. The Texas statute does not preclude an optometrist from owning multiple offices or employing other optometrists. It does not limit the number of patients which an optometrist may treat. The

<sup>&</sup>lt;sup>5</sup> Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Board of Phar acy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

<sup>&</sup>lt;sup>6</sup> A separate provision of the statute, section 5.01, requires that "[e]very person practicing optometry in this state shall display his license or certificate in a conspicuous place in the principal office where he practices . . . and whenever practicing . . . outside of, or away from, said office . . . [to] deliver to each person fitted with glasses a bill, which shall contain his signature . . . and the number of his license or certificate." This provision of the statute has not been challenged. Thus, even without the trade name prohibition, optometrists would be required prominently to display their personal names and licenses.

standards of care that must be provided by optometrists are regulated by separate provisions of the Act that are not challenged or in issue here. The sole effect of the trade name ban is to prevent appellee Rogers (or any other optometrist) from using a trade name as a means of identifying his offices and informing the public that they are part of a single organization that adheres to certain uniform policies and practices.

There is also no merit in appellants' contention that the trade name prohibition is justifiable as a means of promoting high professional standards, preventing deception, or insuring that an optometrist's identity is disclosed to his patients. The use of a trade name is not inconsistent with these goals. The evils which appellants claim the trade name ban is designed to remedy can be dealt with more effectively by other means which do not abridge freedom of speech. Indeed, virtually all of them are already regulated in other provisions of the Texas Optometry Act which are not challenged here.

The mere fact that a trade name may be used in a deceptive manner does not justify a blanket ban on all trade names. There are numerous other provisions of the Act which prohibit such deception. Even before this Court extended First Amendment protection to commercial speech, governmental remedies for false or misleading advertising or deceptive trade name use were invalidated if found to go further than necessary to eliminate the deception.

Nor does the trade name prohibition promote higher quality eye care. There is not a shred of evidence that the mere use of a trade name is inherently inconsistent with the maintenance of high professional standards. Empirical studies have disclosed no differences in the quality of eye care between states which permit the use of a trade name and those which prohibit it. In Texas, high professional standards are assured by detailed pro-

visions of the Act defining the moral and educational qualifications for obtaining an optometrist's license, prescribing the specific steps required for any optometric examination, and establishing grounds and procedures for revoking licenses.

The trade name prohibition is not a means of assuring that a patient knows the name of his optometrist. A separate provision of the Act requires every optometrist to display his license in a conspicuous place in his office, and, when he is practicing outside his office, to provide each patient with a bill containing his signature and license number. An optometrist uses a trade name not instead of, but in addition to, his own name, as a means of disclosing his legitimate affiliation with other optometrists.

Appellants attempt to analogize the trade name ban to other statutes that have been upheld as legitimate restraints on the "time, place or manner" of speech. The statute at issue here, however, restricts the content of speech, not its time, place or manner. Moreover, even "time, place or manner" restrictions are invalid unless they serve a significant governmental interest, are narrowly tailored to further that interest, and leave open ample alternative standards for communication. None of these standards is met by the prohibition at issue here.

Finally, the trade name ban, because it applies only to optometrists and not to ophthalmologists and osteopaths, also violates the Equal Protection Clause of the Fourteenth Amendment. A statutory classification which trenches upon a fundamental right such as freedom of speech must not only have a "rational basis" or be related to some valid state interest. It must be necessary to the promotion of a compelling state interest. If, as appellants contend, the use of a trade name somehow leads to inferior eye care, deceptive practices or concealment of the individual practitioner's identity or reputa-

tion, then *all* practitioners who render eye care should be subject to the ban. Certainly there is no compelling reason why only the free speech of optometrists should be restricted in this fashion.

#### II.

The district court properly enjoined the enforcement not only of section 5.13(d) of the Act, which expressly prohibits use of a trade name, but also "any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name." The latter portion of the injunction was necessary to afford complete relief and put the entire trade name controversy to rest.

If only enforcement of section 5.13(d) had been enjoined, the Texas Optometry Board might attempt to construe some other provision of the Act to bar trade name use by optometrists. While section 5.13(d) is the only provision which expressly prohibits trade names, other sections might be interpreted as containing such a prohibition by implication. The broad order issued by the district court properly prevents appellants from attempting to apply any provision of the Act in a manner which would circumvent the court's judgment. Contrary to appellants' contention, the injunction does not block the enforcement of any other, legitimate prohibition in the statute.

#### ARGUMENT

I.

TEXAS' BLANKET BAN ON THE USE OF TRADE NAMES BY OPTOMETRISTS UNCONSTITUTION-ALLY INFRINGES THEIR FREEDOM OF SPEECH AND DENIES THEM EQUAL PROTECTION OF THE LAWS

Section 5.13(d) of the Texas Optometry Act flatly forbids the use of "any assumed name, corporate name, trade name" in connection with the practice of optometry. The district court held this prohibition to be violative of the First Amendment. Reasoning from Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) and Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the court concluded that because trade names are a means of communicating "to the consuming public information as to certain standards of price and quality, and availability of particular routine services" provided by optometrists, their use comes within the constitutional protection of commercial speech. The court found no support for appellants' claims that an absolute ban on trade name use by optometrists is necessary to preserve high professional standards, to prevent deceptive practices, or to insure disclosure of an optometrist's identity to patients. Accordingly, it held that the "blanket suppression of the use of trade names results in unwarranted restriction of the free flow of commercial information," in violation of the First Amendment.

Virginia State Board and Bates fully support the decision below. Trade names communicate information to the public. Trade names permit consumers more readily to locate, and more intelligently to choose among, providers of goods and services. Like the price information held protected in Virginia State Board and Bates, trade names

facilitate efficient allocation of resources through informed private economic decisionmaking, and thus are a constitutionally protected form of commercial communication.

Further, the restriction of commercial speech at issue here cannot be sustained as a permissible regulation of business conduct or professional standards, and is not justified by any overriding state interest. It imposes a direct, absolute, and unjustified restraint on truthful communication concerning lawful activity. As applied to appellee Rogers, the Act prohibits use of a trade name specifically held by the district court—in a finding not challenged here—to be entirely free from deception. So bald and drastic a ban on commercial speech cannot stand under the First Amendment.

#### A. Trade Name Use is Constitutionally Protected Commercial Speech

In 1969, when the Texas Optometry Act was enacted, commercial speech was not thought to be protected by the First Amendment. See Valentine v. Chrestensen, 316 U.S. 52 (1942). It is clear today that commercial communication enjoys constitutional protection. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Carey v. Population Services International, 431 U.S. 678 (1977); Bigelow v. Virginia, 421 U.S. 809 (1975). As this Court has held, the free flow of commercial information is a matter of vital First Amendment concern both to individuals and to the society as a whole. The consumer's interest in such information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Virginia State Board, supra, 425 U.S. at 763. Significant societal interests are advanced by uninhibited commercial speech since it "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." Bates, supra, 433 U.S. at 364. Even a communication which does "no more than propose a commercial transaction" is protected by the First Amendment. Virginia State Board, supra, 425 U.S. at 762, quoting Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 385 (1973).

Like the other forms of commercial communication this Court has held to be constitutionally protected, see Virginia State Board, supra (prescription drug advertising); Bates, supra (advertising of legal services); Carey v. Population Services International, supra, (contraceptive advertising); Linmark Associates, Inc. v. Township of Willingboro, supra (real estate "for sale" and "sold" signs), trade name use furthers "individual and societal interests in assuring informed and reliable decisionmaking" by the consuming public. Bates, supra, 433 U.S. at 364. The record in this case contains compelling and uncontradicted expert evidence that the information communicated by trade names is "one of the most valuable assets which [consumers] have in this large mobile country." (A. 336.) Dr. Lee Benham, a

Through The Professions: A Perspective on Information Control, 18 J. Law & Econ. 421 (1975). Dr. Benham's analyses of the impact of information restraints on eyeglass prices were heavily relied upon by the Federal Trade Commission in promulgating its recent ruling prohibiting state restraints on the advertising of ophthalmic goods and services. The Commission concluded "that the Benham data is reliable and in conjunction with other economic evidence provides a sound empirical base on which to promulgate this rule." 43 Fed. Reg. 23995 (June 2, 1978).

leading economist who has extensively studied the effects of advertising on the price and quality of eye care, testified:

Consumers develop a sophisticated understanding of the goods and services provided and the prices associated with different trade names. This permits them to locate the goods, services, and prices they prefer on a continuing basis with substantially lower search costs than would otherwise be the case . . . This also means that firms have an enormous incentive to develop and maintain the integrity of the product and services provided under their trade name: the entire package they offer is being judged continuously by consumers on the basis of the samples they purchase.

If there were no trade names, individuals would have much greater difficulty obtaining information about the range of providers. They might know the providers in the given community well, but if they moved or if some of the providers moved, the problems of acquiring new information would face them . . . (A. 336.)

The trade name provides information about where consumers can go if they like the service. (A. 338.)

Restrictions on the use of the trade name would mean that consumers are less well informed about their options. (A. 336.)

But there is scarcely need for expert testimony to confirm the communicative role of trade names. One need only think of such names as "Hilton," "Sears" or "Volkswagen" to appreciate the indispensable informational function they serve. These names, like all trade names with which the public has grown familiar, connote a certain mix of price, quality, and service elements that

affect intelligent consumer choice. By transmitting information about those elements in short-hand, symbolic form, trade names enable consumers readily, efficiently, and therefore cheaply, to find sources of goods or services that best fit their needs and budgets. In a vast and complex economy like ours, no other means of identifying a business enterprise is as convenient as a trade name.

At the same time, trade name use promotes a more efficient allocation of economic resources: like a trademark, it "makes effective competition possible in a complex, impersonal marketplace by providing a means through which the consumer can identify products which please him and reward the producer with continued patronage. Without some such method of product identification, informed consumer choice, and hence meaningful competition in quality, could not exist." Smith v. Chanel, Inc., 402 F.2d 562, 566 (9th Cir. 1968) (footnote omitted).

Many organizations which provide professional services operate under some form of trade, firm, or corporate name, and in the professional sphere, as elsewhere, such names serve an important informational function. In the medical field, hospitals have always used names such as Mayo Clinic or Washington Hospital Center, and medical group-practice plans also commonly use corporate names (e.g., Group Health Association in Washington, D.C., or Kaiser Permanente Foundation in California). Law firms often use the names of founding partners, even after they have died or retired (e.g., Covington and Burling), and the same is true of accounting firms (e.g.,Peat, Marwick, Mitchell & Co., Arthur Andersen & Co.). The people working these organizations are constantly changing and may be known to the public, but the name of the organization itself is known and is associated in the public mind with certain standards of service, quality and price.

The use of a trade name is particularly important to a professional organization which has multiple offices in different cities. For example, a large national accounting firm must use a single name to communicate to the public the fact that all of its many offices are part of one organization, and adhere to a single standard of service and price.

Appellee Rogers, together with his associates, has for many years operated a large number of optometry offices located throughout Texas under the name "Texas State Optical" or "TSO." These offices adhere to certain uniform standards and policies as to quality of service, price, credit, transferability of patient records between offices, availability of examinations without prior appointments, free adjustment of eveglasses and frames, and other matters. Appellee's trade name has come to be identified with these standards and policies. The use of that name is a simple and effective means by which appellee can identify to the public the offices which are part of his organization, and at which the "TSO" standard of service and care is available.8 The trade name also enables a person who has received satisfactory service from one of appellee's offices to find another such office in a different neighborhood or a different city.

In sum, trade names—whether used in connection with the practice of optometry, the practice of other professions, or purely commercial enterprises—advance the same interests identified by this Court in *Virginia State Board* and *Bates* as meriting First Amendment protection. They are a means of conveying information as to the source, quality, and price of goods or services, thereby facilitating consumer choice among competing providers and promoting the efficient distribution of economic resources. *Virginia State Board* and *Bates* leave no doubt that trade name use is commercial speech deserving constitutional protection.

#### B. The Trade Name Prohibition Does Not Regulate Business Conduct, But Directly Suppresses Speech

Appellants and the American Optometric Association ("AOA"), as amicus curiae, contend that Texas' total ban on trade name use by optometrists is constitutionally distinguishable from the restrictions on commercial communication by professionals already invalidated by this Court. They argue, first, that unlike the provisions involved in Virginia State Board and Bates, section 5.13(d) is a regulation of business conduct, not speech. The statute at issue here, they say, does not block the flow of commercial information, but rather "bars an entire form of business organization and conduct." (Amicus Brief at 7.) As described by the AOA, "this conduct consists of a form of business organization where a trade name owner employs individual optometrists and may often control the volume of patients they treat." (Amicus Brief at 3.) According to appellants, "this mode of practicing, more often than not, includes a high volume practice which tends to lead toward poor quality patient care." (State Brief at 18.)

These arguments, however, are fatally flawed, for the "form of business organization and conduct" that appellants and AOA find offensive is in no way prohibited by the provision at issue here, nor, indeed, by any other provision of Texas law. Section 5.13(d) prohibits trade name use—nothing more and nothing less. Neither it nor any other provision of the Texas Optometry Act sets a limit on the number of offices that an optometrist may

s Under Texas law, it is also the *only* such means. The statute not only prohibits the use of a trade name, but also prohibits an optometrist from using his own name in an office in which he does not personally practice. (Section 5.13(e).) Thus, appellee cannot use any single name, even his own, to identify all of the offices which are under his ownership or management, and which pursue the standards and policies of the TSO organization.

own. Neither it nor any other provision sets a limit on the number of optometrists that may be employed. Neither it nor any other provision sets a limit on the number of patients that an optometrist may treat. The standards of care that must be provided by optometrists are regulated by the Act in specific provisions not here challenged or in issue. Section 5.13(d) has nothing to do with these other provisions.

Indeed, the very mode of activity to which appellants apparently object is affirmatively authorized by other provisions of the Texas Optometry Act:

This Act does not prohibit an optometrist from being employed on a salary . . . by a licensed optometrist . . . regardless of the amount of supervision exerted by the employing optometrist . . . over the office in which the employed optometrist works . . . (Section 5.13(c).)

... a licensed optometrist ... [may] have, own, or acquire [an] interest in the practice, books, records, files, equipment, or materials of a licensed optometrist, or have, own, or acquire [an] interest in the premises or space occupied by a licensed optometrist for the practice of optometry . . . . (Section 5.15 (d).)

That the trade name prohibition is not a regulation of modes of commercial organization or professional conduct is perhaps best indicated by two hypothetical examples of its application:

The case of Dr. Smith. Dr. Smith is an optometrist who uses no trade name in connection with his business but who owns more than one hundred offices and employs nearly a thousand optometrists who treat patients each day at a rate

of six patients per hour. No violation of section 5.13(d).

2) The case of *Dr. Jones*. Dr. Jones is a sole practitioner who owns no offices other than his own, who employs no optometrist other than himself, and who sees only four patients per day, examining each for two hours. Dr. Jones calls his office "Lone Star Optical." Section 5.13(d) is violated.

In light of these examples, appellants' and AOA's characterization of section 5.13(d) as regulating business conduct rather than speech is hard to understand. The supposed "sphere of conduct by optometrists, separate from speech, that is . . . banned by the Texas 'trade name statute'" (Amicus Brief at 7) reflects merely the rhetoric of counsel, not the reality of Texas law. What section 5.13(d) actually and directly proscribes is pure communication, not conduct, nor even some combination of the two.

Moreover, it is communication concerning lawful activity that this statute seeks to silence. Appellants and AOA struggle to analogize this case to Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973), where advertisements proposing illegal commercial activity-sex discrimination in employmentwere held to be outside First Amendment protection. They claim that since section 5.13(d) prohibits "trade name conduct," its "incidental" suppression of trade name use is simply a permissible ban "on the advertising of illegal conduct." (Amicus Brief at 7.) Here, however, there is no illegal conduct involved to which section 5.13(d)'s ban on trade name use could be deemed "incidental." It is directed at communication alone. The statute does not prohibit Dr. Rogers (or any other optometrist) from owning numerous offices and operating them as a single enterprise. It does prohibit him from using a trade

<sup>&</sup>lt;sup>9</sup> As previously noted, the 1969 Texas Optometry Act represented a compromise reached by the opposing "professional" and "commercial" optometrists.

name as a means of identifying his offices and informing the public that they are part of a single organization, having uniform standards and policies concerning the cost and quality of service and products. It prohibits speech, pure and simple, and should be judged as such.

#### C. The Trade Name Prohibition Cannot Be Justified by Any Overriding State Interest

Appellants also contend that even if the trade name ban suppresses speech protected by the First Amendment, the statute is nevertheless constitutional because it serves overriding state interests. Absolute prohibition of trade name use is necessary, they argue, to preserve high standards of professionalism in the practice of optometry, to prevent deception of the public by optometrists using trade names, and to insure that an optometrist's identity is known to his patients.

This Court has made clear that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." NAACP v. Button, 371 U.S. 415, 439 (1963). Even regulations which impinge only indirectly on freedom of speech are unconstitutional if there are "less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnote omitted). To pass muster under the First Amendment, a regulation must not only further "an important or substantial governmental interest... unrelated to the suppression of free expression," but any "incidental restriction" on free speech resulting from the regulation must be "no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968).

The statutory prohibition on trade name use is hardly "essential" to the achievement of any of the goals which appellants attribute to it. Indeed, there is no connection between the use of a trade name and the various evils

which appellants claim the statute is designed to remedy. And, in any event, those evils can be remedied far more effectively by regulations which deal with them directly, and do not abridge freedom of speech. In fact, virtually all of them are already regulated in other provisions of the statute which are not challenged here.

### 1. Section 5.13(d) is not a permissible exercise of state power to prohibit deceptive practices

Appellants contend that Texas' unqualified prohibition on optometrists' trade name use is justified because there have been some past instances of deception engaged in by optometrists who use trade names. The sole support offered for this claim is the opinion in Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex.), cert. denied, 389 U.S. 52 (1967), describing certain abuses by some individual optometrists—specifically, the use of the name of an optometrist at an office where that optometrist did not actually practice, and the use of several different trade names to disguise the connection between offices owned by a single optometrist. From the discussion by the Carp court, it is argued that an absolute blanket ban on trade name use is necessary and constitutionally permissible.

That conclusion is a non sequitur. In the first place, regulation of the practice of optometry in Texas has undergone radical change since 1967, when Carp was decided. Two years after Carp, the Texas Optometry Act was passed. In provisions of the Act not at issue here, and in other subsequent legislation, the state has directly proscribed the deceptive practices described in that case. Thus, section 5.13(e) forbids an optometrist to "use, cause or allow to be used, his name . . . on or about the door, window, wall, directory or any sign or listing whatsoever, of any office, location or place where optometry is practiced, unless said optometrist is actually

present and practicing optometry therein. . . . " More generally, section 4.04(a)(2) makes "any fraud, deceit, dishonesty, or misrepresentation in the practice of opotmetry . . ." a ground for license revocation or suspension; and section 5.04(1) makes it unlawful for any person to "falsely impersonate any person duly licensed as an optometrist . . . or to falsely assume another name." Further, in its Deceptive Trade Practices-Consumer Protection Act of 1973. Texas has specifically prohibited, among other misleading commercial practices, "causing confusion" as to the "source, sponsorship, approval, or certification of . . . services" or as to "affiliation, connection or association with, or certification by another." Tex. Bus. & Comm. Code, § 17.46(b) (2), (3). Against this regulatory background, the claim that section 5.13(d) is necessary to protect Texas citizens against deception is completely deflated.

In any event, the imposition of a blanket ban on optometrists' trade name use is far more drastic than any problem of deception warrants and than the First Amendment permits. To prohibit all trade name use by optometrists because of the fear that a few practitioners who use them might engage in deception is to "burn the house to roast the pig." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). The First Amendment forbids such statutory overkill.<sup>10</sup>

Even before this Court took commercial speech into the First Amendment's protective fold, governmental remedies for false or misleading advertising or deceptive trade name use were invalidated if found to go further than necessary to eliminate the deception. FTC v. Royal Milling Co., 288 U.S. 212 (1933), is illustrative. At issue there was the validity of FTC orders forbidding the use of certain trade names the agency had found deceptive. While sustaining the Commission's findings that the names in question were misleading, this Court nevertheless held the remedial orders improper, since

the commission went too far in ordering what amounts to a suppression of the trade-names. These names . . . constitute valuable business assets . . ., the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil . . .; and this can be done . . . by requiring proper qualifying words to be used in immediate connection with the names. (Id. at 217 (emphasis added).)

See also Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946); Elliott Knitwear, Inc. v. FTC, 266 F.2d 787 (2d Cir. 1959). Cf. Talley v. California, 362 U.S. 60 (1960) (overturning ordinance that forbade distribution of any handbill not bearing name and address of person who prepared, distributed, or sponsored it; defense that ordinance could help identify those responsible for false advertising rejected since ordinance went further than necessary to achieve this goal).

Surely the scope of permissible regulation to remedy deception in commercial speech has not been expanded by this Court's recent decisions extending constitutional protection to such speech. See, e.g., Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977) (total ban on words "Instant Loan Refund" in loan advertisement impermissible where less drastic means to guard against deception are available). See also Warner-Lambert Co. v. FTC, 562 F.2d 749, (D.C. Cir. 1977), cert. denied, 98 S.Ct. 1575 (1978); Fur

<sup>&</sup>lt;sup>10</sup> Pharmacists are also professionals. No one would seriously suggest that the deceptive use of trade names by some pharmacists would justify a state law banning all pharmacists from practicing their profession under the trade name of the drug store by which they are employed.

Information and Fashion Council, Inc. v. E. F. Timme & Son, Inc., 364 F. Supp. 16 (S.D.N.Y. 1973), aff'd, 501 F.2d 1048 (2d Cir.), cert. denied, 419 U.S. 1022 (1974); Anderson, Clayton & Co. v. Washington State Department of Agriculture, 402 F. Supp. 1253 (W.D. Wash. 1975) (three-judge court) (ban on ads comparing margarine with butter impermissible where less drastic means to prevent deception are available). Cf. Chrysler Corp. v. FTC, 561 F.2d 357, 364 (D.C. Cir. 1977) (FTC order to eliminate misleading advertising modified to reach only the specific violations found). We submit that Texas' sweeping suppression of trade name use goes far "further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective . . . ." Beneficial Corp. v. FTC, supra, 542 F.2d at 619.

### 2. Section 5.13(d) does not promote higher quality eye care

Appellants assert that "certain evils," such as "emphasis on volume rather than quality in patient care" and "|omission of| necessary steps in an examination" would be "more prevalent" if trade name use by optometrists were permitted. (State Brief 24.) Texas' blanket trade name ban, it is argued, is necessary "to ensure that commercial pressures do not undercut the provision of high quality eye care." (Amicus Brief at 8.) But this contention cannot survive even minimal scrutiny, much less the careful scrutiny that the First Amendment mandates.

To begin with, there is no connection between trade name use and inferior patient care. There is not a shred of credible evidence in the record to prove what logic rejects, namely, that the mere use of a trade name—any trade name—is inherently, or typically, inconsistent with an optometrist's adherence to high professional

standards. On the contrary, the record contains compelling evidence negating the existence of any correlation between trade name use and poor quality ophthalmic service. For example, Dr. Benham testified that his extensive empirical research uncovered no evidence whatsoever that the quality of eyecare is lower in states permitting optomtrists to use trade names than in those prohibiting trade name use. (A. 340, 348.)

Even if, as appellants claim, the quality of patient care tends to suffer in a multi-office, high-volume practice, section 5.13(d) is not addressed to, and would be a patently ineffective remedy for, any such problem. As we have demonstrated above, this provision leaves an optometrist completely free to own as many offices, to employ as many optometrists, and to treat as many patients as he pleases. The only freedom section 5.13(d) abridges is an optometrist's freedom to disclose, through the use of a trade name, his legitimate affiliation with other offices and other optometrists, and to disseminate, through the use of a trade name, information enabling consumers to make more efficient and intelligent choices among providers of eye care. The direct deprivation of this freedom, the freedom of speech guaranteed by the First Amendment, operates with the same severity upon the most conscientious and skilled optometrist as upon the most derelict and incompetent.

Other provisions of the Texas Optometry Act subject optometrists to close regulation aimed directly at preserving high professional standards and high quality patient care. For example, an optometrist must meet carefully prescribed educational standards, pass a rigorous examination, and present sworn evidence of his good moral character in order to obtain a license to practice in Texas. (Sections 3.01, 3.02, 3.05.) Once licensed, optometrists must fulfill continuing education requirements as a condition of license renewal (section 4.01B), and

may have their licenses revoked or suspended for any of a long list of infractions including unfitness or incompetence "by reason of negligence" (section 4.04(a)(3)) and "fraud, deceit, dishonesty, or misrepresentation in the practice of optometry." (Section 4.04(a)(2).) Perhaps most importantly, "in order to insure an adequate examination" of each patient, the Act prescribes specific steps which optometrists must follow in conducting examinations (section 5.12), and forbids them to "sign, or cause to be signed, a prescription for an ophthalmic lens without first making a personal examination of the eyes of the person for whom the prescription is made." (Section 5.07.) An optometrist's omission of any of the necessary examination steps may be evidence of negligence and may lead to permanent or temporary loss of his license. (Section 5.12.)

That Texas has power to preserve high standards of professional conduct and patient care through provisions such as these, which serve the state's interest directly and which impose no unnecessary restraint on First Amendment freedom, is not disputed. What we contend, and what *Virginia State Board* and *Bates* teach, is that a state may not pursue the goal of high quality professional service through wholesale suppression of legitimate commercial speech when more direct and effective means are available. Where, as here, the speech restraint is sweeping and utterly unrelated to the asserted governmental objectives, the limits of permissible regulation are plainly exceeded.

### 3. Section 5.13(d) serves no purpose in communicating an optometrist's identity to his patients

Appellants assert that section 5.13(d) is necessary to insure that a patient knows the name of his optometrist. This argument, also, is fatally flawed. It overlooks the fact that section 5.01 of the Texas Optometry Act ex-

pressly serves that purpose. Section 5.01 requires "[e] very person practicing optometry in this state [to] display his license or certificate in a conspicuous place in the principal office where he practices . . . and whenever practicing . . . outside of or away from said office ... [to] deliver to each person fitted with glasses a bill, which shall contain his signature . . . and number of his license or certificate . . . ." As the district court concluded, the use of a trade name is in no way inconsistent with this requirement, or any other affirmative disclosure obligations that Texas may wish to impose. An optometrist uses a trade name not instead of, but rather in addition to his own name. Trade name use simply entails the supplemental disclosure of an optometrist's legitimate affiliation with other optometrists. By prohibiting such disclosure, section 5.13(d) scarcely "assures that more information will be conveyed to the consumer than might otherwise be the case." (TOA Brief at 32.) That description stands section 5.13(d) on its head. The trade name ban assures that less information will be conveyed to the consumer, and that persons seeking eye care will be deprived of information that facilitates more efficient and intelligent choices among providers of ophthalmic services.

# 4. Section 5.13(d) is not a mere "manner" restraint of communication, but an absolute, content-based ban on protected speech

Finally, it is argued that Texas' blanket trade name ban comports with the First Amendment because it is merely a "manner" restriction of free expression. This claim, like the others advanced in section 5.13(d)'s support, is wholly without merit.

The statute at issue here does not bear the slightest resemblance to those this Court has upheld as mere "time, place or manner" restrictions. See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949); Grayned v. City of Rock-

ford, 408 U.S. 104 (1972); Adderley v. Florida, 385 U.S. 39 (1966). Such restrictions are earmarked by their neutrality as to the content of the regulated speech and by their limited scope. Even where commercial communication, rather than some other form of speech, is the subject of regulation, a statute cannot qualify as a "time, place or manner" restriction if it "singles out speech of a particular content and seeks to prevent its dissemination completely." Virginia State Board, supra, 425 U.S. at 771. Yet section 5.13(d) does precisely that: it prohibits communication of a particular commercial content and prohibits it absolutely.

In any event, even if the Texas trade name ban could be classified as a "manner" restriction, appellants' claim that this provision satisfies the First Amendment still would have to be rejected. A statute so classified is not automatically constitutional. Rather, the state must shoulder the burden of establishing: (1) that the regulation serves a significant governmental interest, (2) that it is narrowly tailored to further that interest, and (3) that it leaves open ample alternative channels for communication of information. See Virginia State Board, supra, 425 U.S. at 771; Grayned v. City of Rockford, supra, 408 U.S. at 116-117. Section 5.13(d) satisfies none of these standards.

As we have already shown, the trade name ban does not serve any governmental interest which cannot be more effectively advanced by other means not affecting freedom of speech. And there is no effective method other than the use of a trade name by which an optometric organization such as Texas State Optical can inform the public of the identity and location of the offices which it operates, and at which professional services and goods of the quality and cost associated with its name are available.

D. By Restricting The Freedom of Speech of Optometrists But Not Ophthalmologists And Osteopaths, The Statute Also Violates The Equal Protection Clause

Even if the statute could fairly be said to serve the objectives which appellants attribute to it—and, as shown above, it clearly cannot—it would still suffer from another fatal defect. The ban on trade name use in section 5.13(d) applies only to optometrists. It does not apply to ophthalmologists and osteopaths, whose services include the same kind of eye care provided by optometrists. This discriminatory feature of the statute, which has the effect of restricting the freedom of speech of one class of practitioners while imposing no equivalent restriction on others similarly situated, violates the Equal Protection Clause of the Fourteenth Amendment.

A statutory classification which trenches upon a fundamental right such as freedom of speech "must meet close constitutional scrutiny." Evans v. Cornman, 398 U.S. 419, 422 (1970). In such a situation, "[i]t is not sufficient for the State to show that [the statute furthers] a very substantial state interest." Dunn v. Blumstein, 405 U.S. 330, 343 (1972). Cf. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) (rational basis standard applied where statutory classification was treated as not affecting any fundamental right). The classification, to be valid, must "be necessary to promote a compelling governmental interest..." Shapiro v. Thompson, 394

<sup>&</sup>lt;sup>11</sup> Like optometrists, ophthalmologists and osteopaths "examine eyes for the absence or presence of any defect or disease," "refract the patient to determine whether or not a prescription for glasses or contact lenses [is] needed," prescribe and "in some instances" dispense glasses or contact lenses. Some have their own dispensing offices. (Rogers Dep. II, at 140-41.)

<sup>&</sup>lt;sup>12</sup> In 1955, when Williamson was decided, commercial speech was not deemed to be protected by the First Amendment. See Valentine v. Chrestensen, supra; Virginia State Board, supra, 425 U.S. at 769.

U.S. 618, 634 (1969) (emphasis in original). These "key words emphasize... that a heavy burden of justification is on the State." Dunn v. Blumstein, supra, 405 U.S. at 343.

In Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), the Court held invalid under the Equal Protection Clause a statute which prohibited picketing within a prescribed radius of a public school, because the statute exempted "picketing of any school involved in a labor dispute." The Court did not reach the question of whether the prohibition would have been valid if it had applied to all picketing; it found the statute unconstitutional because it restricted some kinds of picketing protected by the First Amendment but not others. Similarly, in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), the Court struck down a statute which prohibited the outdoor display of certain kinds of movies-those involving nudity -if they could be seen from a public street or public place. Again, the Court did not decide whether such a ban would be valid if it applied to all movies; it merely held that the State had failed to present a compelling justification for the particular classification which the statute established. See also Niemotko v. Maryland, 340 U.S. 268 (1951) (denial of permit to Jehovah's Witnesses to use public park violated Equal Protection Clause where such permits were granted to other groups); Cox v. Louisiana, 379 U.S. 536, 581 (1965) concurring opinion of Black, J.) (prohibition against certain kinds of picketing but not others violates Equal Protection Clause).

In the present case, none of the asserted justifications for the trade name prohibition—even assuming they are otherwise valid—justifies a discriminatory classification limited solely to optometrists. If the use of a trade name somehow leads to inferior eye care, or to deceptive practices, or to concealment of the individual practitioner's identity or reputation, then *all* practitioners who render

eye care—not merely optometrists—should be subject to the ban. Certainly there is no "compelling" reason why only the free speech of optometrists should be restricted in this fashion.

The fact that section 5.13(d) applies only to optometrists merely makes more obvious what is in any event readily apparent from the face of the statute-namely, that the trade name ban is not designed to promote better eye care or prevent unethical or deceptive practices, but merely to restrain competition among optometrists. This provision of the Texas Optometry Act is of a piece with the prohibitions against price advertising, against window displays, and against a myriad of other competitive practices. Insulation of an industry or profession from competition may, to some degree, be within the regulatory power of a state. But it is not a sufficient justification for a prohibition, such as section 5.13(d), which directly impedes freedom of speech and the free flow of commercial information. As the Court put it in Virginia State Board, "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways . . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." 425 U.S. at 770.

II.

## THE INJUNCTION ENTERED BY THE DISTRICT COURT IS NOT OVERBROAD

The district court, having held that the use of a trade name is protected by the First Amendment, entered an injunction against enforcement of section 5.13(d) "or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name." (Appendix to Jurisdictional Statement filed by appellants Friedman et al, A-3.) Appellants

argue that "[t]he only trade name provision raised by the pleadings or litigated by the parties was Section 5.13(d)," and that the court should have enjoined only the enforcement of that specific provision. We submit that the injunction is entirely valid and proper, and that the reference to "any other provision . . . which prohibits in any way the practice of optometry under a trade name" was necessary to afford complete relief and put the entire trade name controversy to rest.

The basic issue before the district court was whether Texas may constitutionally deny optometrists the right to use a trade name. Once the court determined that the state may not, the appropriate remedy was to enjoin the enforcement of any provision of the statute which might be invoked to prohibit exercise of that constitutional right. As this Court has repeatedly emphasized, a court fashioning injunctive relief "cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) (footnote omitted); International Salt Co. v. United States, 332 U.S. 392, 400 (1947): National Society of Professional Engineers v. United States, 98 S. Ct. 1355, 1368 (1978).

Appellants complain that the district court did not identify the provisions of the statute, other than section 5.13(d), to which the injunction would apply. The district court, however, would have no way of predicting which provisions of the Act the Texas Optometry Board might invoke in proceeding against trade name use by optometrists. The purpose of the injunction was to assure that the Board would not attempt to utilize any other provision of the statute as a means of prohibiting trade name use, thereby evading the district court's judgment.

It is certainly conceivable that, if the injunction precluded only the enforcement of section 5.13(d), the state authorities might attempt to prevent the use of a trade name under some other section of the Act. For example, section 5.04(1) makes it unlawful for any person to

falsely impersonate any person duly licensed as an optometrist under the provisions of this Act or to falsely assume another name. . . . (emphasis added.)

While this provision does not appear to be directed at trade name use, it could conceivably be construed to prohibit such use. Similarly, section 5.13(f) provides:

No optometrist shall practice or continue to practice optometry in any office, location or place of practice where any name, names or professional identification on or about the door, window, wall, directory, or any sign or listing whatsoever, or in any manner used in connection therewith, shall indicate or tend to indicate that such office, location or place of practice is owned, operated, supervised, staffed, directed or attended by any person not actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

Were it not for the district court's injunction, the state might attempt to use this section to prohibit the use of a trade name. The purpose of the court's injunction is to preclude the state from attempting to construe and enforce any provision of the statute in this manner.

Appellants contend that the injunction might block the enforcement of entirely valid provisions of the Act, "such as the second part of section 5.09(a) which prohibits misleading advertising or section 5.08 which prohibits optometrists from practicing while suffering from a contagious disease." (State Brief at 32) According to appellants, an optometrist who is accused of violating these provisions could argue that they cannot be enforced

against him "because they in some way restrict his practice of optometry under a trade name." Id. 13 This argument is patently frivolous. Obviously, the intent of the injunction is merely to bar the state from enforcing any prohibition against the use of trade names; it would not block the enforcement of any other, legitimate prohibition in the statute. Moreover, if at any time any party attempted to use the injunction to prevent the enforcement of some valid provision of the Act, it would always be open to appellants to seek modification or clarification of the injunction in the district court. See National Society of Professional Engineers v. United States, supra, 98 S. Ct. at 1368-69.

#### CONCLUSION

For the reasons stated, the judgment and decree of the district court should be affirmed.

Respectfully submitted,

PHILIP ELMAN
JERRY D. ANKER
ROBERT E. NAGLE
JUDITH E. LESSER
WALD, HARKRADER & ROSS
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

ROBERT Q. KEITH
MEHAFFY, WEBER, KEITH
& GONSOULIN
1400 San Jacinto Building
Beaumont, Texas 77701

BRIAN R. DAVIS
DELEON & DAVIS
408 First Federal Plaza
Austin, Texas 78701

Attorneys for Appellees

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<sup>&</sup>lt;sup>13</sup> As evidence that the injunction is overbroad, appellants cite the fact that, after the decree was issued in this case, Dr. Rogers moved to have appellants cited for contempt for attempting to enforce section 5.11 of the Act, which prohibits optometrists from having window displays in their offices. This motion, however, was not based on the portion of the injunction at issue here, but rather on the portion which prohibits enforcement of the statutory prohibition against price advertising. The motion was filed in response to an effort by appellants to prevent Dr. Rogers from maintaining a window display showing various eyeglasses, sunglasses, and other ophthalmic items with prices attached to each. Despite the district court's holding that price advertising is constitutionally protecteda holding which appellants have not challenged on appealappellants took the position that section 5.11 could still be enforced, since that provision was not expressly mentioned in the district court's injunction. This incident, rather than supporting appellants' argument that the injunction is overbroad, demonstrates the need in this case for the kind of comprehensive injunction which the court issued.

#### APPENDIX

# PERTINENT PROVISIONS OF THE TEXAS OPTOMETRY ACT, TEX. REV. STAT. ANN. ART. 4552

#### ARTICLE 1. GENERAL PROVISIONS

#### Art. 4552-1.02. Definitions

As used in this Act:

- (1) The "practice of optometry" is defined to be the employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer nor to prescribe any drug or physical treatment whatsoever, unless such optometrist is a regularly licensed physician or surgeon under the laws of this state. Nothing herein shall be construed to prevent selling ready-to-wear spectacles or eyeglasses as merchandise at retail, nor to prevent simple repair jobs.
- (2) "Ascertaining and measuring the powers of vision of the human eye" shall be construed to include:
- (A) The examination of the eye to ascertain the presence of defects or abnormal conditions which may be corrected, remedied, or relieved, or the effects of which may be corrected, remedied or relieved by the use of lenses or prisms, or
- (B) The employment of any objective or subjective means to determine the accommodative or refractive condition or the range or powers of vision of muscular equilibrium of the human eye, or

## APPENDIX

- (C) The employment of any objective or subjective means for the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its power of vision or adapting lenses or prisms for the aid or relief thereof, and it shall be construed as a violation of this Act, for any person not a licensed optometrist or a licensed physician to do any one act or thing, or any combination of acts or things, named or described in this subdivision; provided, that nothing herein shall be construed to permit optometrists to treat the eye for any defect whatsoever in any manner, nor to administer any drug or physical treatment whatsoever, unless said optometrist is a duly licensed physician and surgeon, under the laws of this state.
- (3) "Fitting lenses or prisms" shall be construed to include:
- (A) Prescribing or supplying, directly or indirectly, lenses or prisms, by the employment of objective or subjective means or the making of any measurements whatsoever involving the eyes or the optical requirements thereof: provided, however, that nothing in this Act shall be construed so as to prevent an ophthalmic dispenser, who does not practice optometry, from measuring interpupillary distances or from making facial measurements for the purpose of dispensing, or adapting ophthalmic prescriptions or lenses, products and accessories in accordance with the specific directions of a written prescription signed by a licensed physician or optometrist; provided, however, the fitting of contact lenses shall be done only by a licensed physician or licensed optometrist as defined by the laws of this state, but the lenses may be dispensed by an ophthalmic dispenser on a fully written contact lens prescription issued by a licensed physician or optometrist, in which case the ophthalmic dispenser may fabricate or order the contact lenses and dispense them to the patient with appropriate instructions

for the care and handling of the lenses, and may make mechanical adjustment of the lenses, but shall make no measurements of the eye or the cornea or evaluate the physical fit of the lenses, by any means whatsoever; provided that the physician or optometrist who writes or issues the prescription shall remain professionally responsible to the patient.

- (B) The adaptation or supplying of lenses or prisms to correct, relieve or remedy any defect or abnormal condition of the human eye or to correct, relieve or remedy or attempt to correct, relieve or remedy the effect of any defect or abnormal condition of the human eye.
- (C) It shall be construed as a violation of this Act for any person not a licensed optometrist or a licensed physician to do any one thing or act, or any combination of things or acts, named or described in this Article.

#### ARTICLE 3. EXAMINATIONS

#### Art. 4552-3.01. Must pass examination

Every person hereafter desiring to be licensed to practice optometry in this state shall be required to pass the examination given by the Texas Optometry Board.

#### Art. 4552—3.02. Application

(a) The applicant shall make application, furnishing to the secretary of the board, on forms to be furnished by the board, satisfactory sworn evidence that he has attained the age of 21 years, is of good moral character, is a citizen of the United States, and has at least graduated from a first grade high school, or has a preliminary education equivalent to permit him to matriculate in The University of Texas, and that he has attended and gradu-

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ated from a reputable university or college of optometry which meets with the requirements of the board, and such other information as the board may deem necessary for the enforcement of this Act.

(b) A university or school of optometry is reputable whose entrance requirements and course of instruction are as high as those adopted by the better class of universities and schools of optometry and whose course of instruction shall be equivalent to not less than six terms of eight months each, and approved by the board. Provided, however, that the provisions of this subsection shall only apply to those students enrolling in school from and after the effective date of this Act.

#### Art. 4552-3.05. Subjects of examination

The examination shall consist of written, oral or practical tests, in practical, theoretical, and physiological optics, in theoretical and practical optometry, and in the anatomy, physiology and pathology of the eye as applied to optometry and in such other subjects as may be regularly taught in all recognized standard optometric universities or schools.

#### Art. 4552-3.06. Conduct of examination

All examinations shall be conducted in writing and by such other means as the board shall determine adequate to ascertain the qualifications of applicants and in such manner as shall be entirely fair and impartial to all individuals and every recognized school of optometry. All applicants examined at the same time shall be given the same written examination.

#### Art. 4552—3.07. Those passing entitled to license

Every candidate successfully passing the examination and meeting all requirements of the board shall be registered by the board as possessing the qualifications required by this law and shall receive from this board a license to practice optometry in the state.

## ARTICLE 4. LICENSES—RENEWAL, REVOCATION, ETC.

#### Art. 4552-4.01B Educational requirement for renewal

- (a) Each optometrist licensed in this state shall take annual courses of study in subjects relating to the utilization and application of scientific, technical, and clinical advances in vision care, vision therapy, visual training, and other subjects relating to the practice of optometry regularly taught by recognized optometric universities and schools.
- (b) The length of study required is 12 hours per calendar year.
- (c) The continuing education requirements established by this section shall be fulfilled by attendance in continuing education courses sponsored by an accredited college of optometry or in a course approved by the board. Attendance at a course of study shall be certified to the board on a form provided by the board and shall be submitted by each licensed optometrist in conjunction with his application for renewal of his license and submission of renewal fee.
- (d) The board may take action necessary in order to qualify for funds or grants made available by the United States or an agency of the United States for the establishment and maintenance of programs of continuing education.
- (e) Licensees who have not complied with the requirement of this section may not be issued a renewal license, except for the following persons who are exempt:

- (1) a person who holds a Texas license but who does not practice optometry in Texas;
- (2) a licensee who served in the regular armed forces of the United States during part of the 12 months immediately preceding the annual license renewal date;
- (3) a licensee who submits proof that he suffered a serious or disabling illness or physical disability which prevented him from complying with the requirements of this section during the 12 months immediately preceding the annual license renewal date; or
- (4) a licensee first licensed within the 12 months immediately preceding the annual renewal date.

#### Art. 4552-4.04. Revocation, suspension, etc.

- (a) The board may, in its discretion, refuse to issue a license to any applicant and may cancel, revoke or suspend the operation of any license if it finds that:
- (1) the applicant or licensee is guilty of gross immorality;
- (2) the applicant or licensee is guilty of any fraud, deceit, dishonesty, or misrepresentation in the practice of optometry or in his seeking admission to such practice;
- (3) the applicant or licensee is unfit or incompetent by reason of negligence;
- (4) the applicant or licensee has been convicted of a felony or a misdemeanor which involves moral turpitude;
- (5) the applicant or licensee is an habitual drunkard or is addicted to the use of morphine, cocaine or other drugs having similar effect or has become insane or has been adjudged by a court of competent jurisdiction to be of unsound mind;

- (6) the licensee has directly or indirectly employed, hired, procured, or induced a person, not licensed to practice optometry in this state, to so practice;
- (7) the licensee directly or indirectly aids or abets in the practice of optometry any person not duly licensed to practice under this Act;
- (8) the licensee directly or indirectly employs solicitors, canvassers or agents for the purpose of obtaining patronage;
- (9) the licensee lends, leases, rents or in any other manner places his license at the disposal or in the service of any person not licensed to practice optometry in this state;
- (10) the applicant or licensee has willfully or repeatedly violated any of the provisions of this Act;
- (11) the licensee has willfully or repeatedly represented to the public or any member thereof that he is authorized or competent to cure or treat diseases of the eye;
- (12) the licensee has his right to practice optometry suspended or revoked by any federal agency for a cause which in the opinion of the board warrants such action;
- (13) the applicant or licensee has been finally convicted of violation of Article 773 of the Penal Code.
- (b) Proceedings under this section shall be begun by filing charges with the board in writing and under oath. Said charges may be made by any person or persons. The chairman of the board shall fix a time and place for a hearing and shall cause a copy of the charges, together with a notice of the time and place fixed for the hearing, to be served on the respondent or his counsel at least 10 days prior thereto. When personal service cannot be effected, the board shall cause to be published once a week

for two successive weeks a notice of the hearing in a newspaper published in the county wherein the respondent was last known to practice, and shall mail a copy of the charges and of such notice to the respondent at his last known address. When publication of the notice is necessary, the date of hearing shall not be less than 10 days after the last date of the publication of the notice.

- (c) At said hearing the respondent shall have the right to appear either personally or by counsel, or both, to produce witnesses and evidence on his behalf, to cross examine witnesses and to have subpoenas issued by the board. The board shall thereupon determine the charges upon their merits.
- (d) Any person whose license to practice optometry has been refused or has been revoked or suspended by the board may, within 20 days after the making and entering of such order, take an appeal to any of the district courts of the county of his residence, but the decision of the board shall not be stayed or enjoined except upon application to such district court after notice to the board.
- (e) Upon application, the board may reissue a license to practice optometry to a person whose license has been revoked but such application shall not be made prior to one year after the revocation and shall be made in such manner and form as the board may require.
- (f) Nothing in this Act shall be construed to prevent the administrator or executor of the estate of a deceased optometrist from employing a licensed optometrist to carry on the practice of such deceased during the administration of such estate nor to prevent a licensed optometrist from working for such person during the administration of the estate when the legal representative thereof has been authorized by the county judge to continue the operation of such practice.

#### ARTICLE 5. DUTIES OF LICENSEES; CONDUCT OF LICENSEES AND OTHERS

#### Art. 4552-5.01. Display of license

Every person practicing optometry in this state shall display his license or certificate in a conspicuous place in the principal office where he practices optometry and whenever required, exhibit such license or certificate to said board, or its authorized representative, and whenever practicing said profession of optometry outside of, or away from said office or place of business, he shall deliver to each person fitted with glasses a bill, which shall contain his signature, post-office address, and number of his license or certificate, together with a specification of the lenses and material furnished and the prices charged for the same respectively.

#### Art. 4552—5.02. Recordation of license

It shall be unlawful for any person to practice optometry within the limits of this state who has not registered and recorded his license in the office of the county clerk of the county in which he resides, and in each county in which he practices, together with his age, post-office address, place of birth, subscribed and verified by his oath. The fact of such oath and record shall be endorsed by the county clerk upon the license. The absence of record of such license in the office of the county clerk shall be prima facie evidence of the lack of the possession of such license to practice optometry.

#### Art. 4552—5.03. Optometry register

Each county clerk in this state shall purchase a book of suitable size, to be known as the "Optometry Register" of such county, and set apart at least one full page for the registration of each optometrist, and record in said optometry register the name and record of each optometrist who presents for record a license or certificate issued by the state board. When an optometrist shall have his

license revoked, suspended, or cancelled, said county clerk, upon being notified by the board, shall make a note of the fact beneath the record in the optometry register, which entry shall close the record and be prima facie evidence of the fact that the license has been so cancelled, suspended or revoked. The county clerk of each county shall, upon the request of the secretary of the board, certify to the board a correct list of the optometrists then registered in the county, together with such other information as the board may require.

## Art. 4552-5.04. Practice without license; fraud; house-to-house

It shall be unlawful for any person to:

- (1) falsely impersonate any person duly licensed as an optometrist under the provisions of this Act or to falsely assume another name;
- (2) buy, sell, or fraudulently obtain any optometry diploma, license, record of registration or aid or abet therein;
- (3) practice, offer, or hold himself out as authorized to practice optometry or use in connection with his name any designation tending to imply that he is a practitioner of optometry if not licensed to practice under the provisions of this Act:
- (4) practice optometry during the time his license shall be suspended or revoked;
- (5) practice optometry from house-to-house or on the streets or highways, notwithstanding any laws for the licensing of peddlers. This shall not be construed as prohibiting an optometrist or physician from attending, prescribing for and furnishing spectacles, eyeglasses or ophthalmic lenses to a person who is confined to his abode by reason of illness or physical or mental infirmity, or in

response to an unsolicited request or call, for such professional services.

#### Art. 4552-5.05. Treating diseased eyes

Anyone practicing optometry who shall prescribe for or fit lenses for any diseased condition of the eye, or for the disease of any other organ of the body that manifests itself in the eye, shall be deemed to be practicing medicine within the meaning of that term as defined by law. Any such person possessing no license to practice medicine who shall so prescribe or fit lenses shall be punished in the same manner as is prescribed for the practice of medicine without a license.

#### Art. 4552—5.06. Spectacles as premiums

It shall be unlawful for any person in his state to give, or cause to be given, deliver, or cause to be delivered, in any manner whatsoever, any spectacles or eyeglasses, separate or together, as a prize or premium, or as an inducement to sell any book, paper, magazine or any work of literature or art, or any item of merchandise whatsoever.

#### Art. 4552-5.07. Prescribing without examintaion

No licensed optometrist shall sign, or cause to be signed, a prescription for an ophthalmic lens without first making a personal examination of the eyes of the person for whom the prescription is made.

# Art. 4552-5.08. Practice while suffering from contagious disease

No licensed optometrist shall practice optometry while knowingly suffering from a contagious or infectious disease.

#### Art. 4552-5.09. Advertising by optometrists

(a) No optometrist shall publish or display, or knowingly cause or permit to be published or displayed by

newspaper, radio, television, window display, poster, sign, billboard, or any other advertising media, any statement or advertisement of any price offered or charged by him for any ophthalmic services or materials, or any statement or advertisement concerning ophthalmic lenses, frames, eyeglasses, spectacles, or parts thereof which is fraudulent, deceitful, misleading, or which in any manner whatsoever tends to create a misleading impression, including statements or advertisements of bait, discount, premiums, gifts, or any statements or advertisements of a similar nature, import, or meaning.

(b) This section shall not operate to prohibit optometrists who also own, operate, or manage a dispensing opticianry from advertising in any manner permitted under any section of this bill so long as such advertising is done in the name of the dispensing opticianry and not in the name of the optometrist in his professional capacity.

#### Art. 4552-5.10. Advertising by dispensing opticians

- (a) No person, firm or corporation shall publish or display or cause or permit to be published or displayed in any newspaper or by radio, television, window display, poster, sign, billboard or any other means or media any statement or advertisement concerning ophthalmic lenses, frames, eyeglasses, spectacles or parts thereof which is fraudulent, deceitful or misleading, including statements or advertisements of bait, discount, premiums, price, gifts or any statements or advertisements of a similar nature, import or meaning.
- (b) No person, firm or corporation shall publish or display or cause or permit to be published or displayed in any newspaper, or by radio, television, window display, poster, sign, billboard or any other means or media,

any statement or advertisement of or reference to the price or prices of any eyeglasses, spectacles, lenses, contact lenses or any other optical device or materials or parts thereof requiring a prescription from a licensed physician or optometrist unless such person, firm or corporation complies with the provisions of Subsections (c)-(j) of this section.

- (c) The person, firm or corporation shall obtain from the board an "Advertising Permit," which permit shall be granted to any person, firm or corporation which is engaged in the business of a dispensing optician in Texas.
- (d) Such person, firm or corporation shall after receipt of such permit, but before beginning any such advertising, file with the board a list of prices which shall be charged for such eyeglasses, spectacles, lenses, contact lenses or other optical devices or materials or parts thereof in each and all of the following categories:
  - single vision lenses;
  - (2) kryptok bifocal lenses;
  - (3) regular bifocal lenses;
  - (4) trifocal lenses;
  - (5) aphakic lenses;
  - (6) prism lenses;
  - (7) double segment bifocal lenses;
  - (8) subnormal vision lenses;
  - (9) contact lenses.
- (e) No change may be made in any such price advertisement until the change has been filed with the board.
- (f) Any advertisement or statement published or displayed as above described which contains the price of any of the categories shown above shall also contain the prices of all other categories and all such items, and the prices thereof, shall be published or displayed with equal promi-

nence. No advertisement which shows the price of items listed in the categories shown above shall contain any language which directly or indirectly compares the prices so quoted with any other prices of similar items. In the event an "Advertising Permit" is issued to a dispensing optician there shall be displayed prominently in each reception room and display room of each office owned or operated by such dispensing optician a complete current list of all prices on file with the board as provided above. In showing the price of "all other categories and all such items" as required by this section, it shall be permissible to combine two or more categories into one general category of "all other lenses" and designate the price thereby of "up to \$---" which represents the highest price of any lenses included within this combined general category. Should there be a category in which two or more price differentials exist, it shall be permissible for the category to have a single listing in the advertisement with the lowest and the highest price in the category designated.

- (g) In the event the dispensing optician owns more than one office, the prices for all such eyeglasses, spectacles, lenses, contact lenses or other optical devices or materials or parts thereof in the same category shall be the same in all offices located within the geographical limits of a county or a city regardless of the name under which such dispensing optician operates such offices.
- (h) All such eyeglasses, spectacles, lenses, contact lenses, or other optical devices or materials or parts thereof must conform to standards of quality as promulgated by the American Standards Association, Inc., and commonly known as Z80.1—1964 standards.
- (i) On or before April 1, of each calendar year each person, firm or corporation holding an "Advertising Permit" hereunder shall file with the board a statement

sworn to by such person or officer of such firm or corporation specifying separately for each office owned by such person, firm or corporation the percentage of the total unit sales of each such office owned by such person, firm or corporation allocated to sales of single vision lenses, bifocal lenses, trifocal lenses, contact lenses and all other lenses requiring a prescription from a licensed physician or optometrist during the prior calendar year. The person making such sworn statement shall be subject to the obligations and penalties of Article 310 of the Penal Code.

- (j) All items advertised by price in accordance with this section shall be available at the advertised price without limit to quantity to all persons including, but not limited to, individuals, physicians, optometrists, dispensing opticians or the employees of any of them.
- (k) Willful or repeated violation by any person, firm or corporation holding an "Advertising Permit" hereunder of any provision of Subsections (d)-(j) of this section shall be grounds for suspension of such "Advertising Permit" by the board for a period not to exceed six months. If after the expiration of such suspension, the board, after a hearing, finds that there has been a second or subsequent willful or repeated violation of any provision of Subsections (d)-(j) of this section such "Advertising Permit" shall be permanently cancelled and may not be reissued or renewed.

#### Art. 4552-5.11. Window displays and signs

- (a) It shall be unlawful for any optometrist:
- (1) to display or cause to be displayed any spectacles, eyeglasses, frames or mountings, goggles, lenses, prisms, contact lenses, eyeglass cases, ophthalmic material of any kind, optometric instruments, or optical tools or machinery, or any merchandise or advertising of a commercial nature in his office windows or reception rooms;

- (2) to make use of or permit the continuance of any colored or neon lights, eyeglasses or eye signs, whether painted, neon, decalcomania, or any other either in the form of eyes or structures resembling eyes, eyeglass frames, eyeglasses or spectacles, whether lighted or not, or any other kind of signs or displays of a commercial nature in his optometric office.
- (b) Any optometrist practicing optometry on or after April 15, 1969 in a manner, or under conditions, contrary to any of the provisions of this Section 5.11 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.11 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease expiring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

#### Art. 4552-5.12. Basic competence

- (a) In order to insure an adequate examination of a patient for whom an optometrist signs or causes to be signed a prescription for an ophthalmic lens, in the initial examination of the patient the optometrist shall make and record, if possible, the following findings of the condition of the patient:
- (1) Case History (ocular, physical, occupational and other pertinent information).
- (2) Far point acuity, O.D., O.S., O.U., unaided; with old glasses, if available, and with new glasses, if any.
  - (3) External examination (lids, cornea, sclera, etc.).
- (4) Internal ophthalmoscopic examination (media, fundus, etc.).
  - (5) Static retinoscopy, O.D., O.S.
  - (6) Subjective findings, far point and near point.

- (7) Phorias or ductions, far and near, lateral and vertical.
  - (8) Amplitude or range of accommodation.
  - (9) Amplitude or range of convergence.
  - (10) Angle of vision, to right and to left.
- (b) Every prescription for an ophthalmic lens shall include the following information: interpupillary distance, far and near; lens prescription, right and left; color or tint; segment type, size and position; the optometrist's signature.
- optometrist to comply with any of the foregoing requirements shall be considered by the board to constitute prima facie evidence that he is unfit or incompetent by reason of negligence within the meaning of Section 4.04(a) (3) of this Act, and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instances in which it is alleged that the rule was not complied with. At a hearing pursuant to the filing of such charges, the person charged shall have the burden of establishing that compliance with the rule in each instance in which proof is adduced that it was not complied with was not necessary to a proper examination of the patient in that particular case.

#### Art. 4552-5.13. Professional responsibility

- (a) The provisions of this section are adopted in order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship.
- (b) No optometrist shall divide, share, split, or allocate, either directly or indirectly, any fee for optometric services or materials with any lay person, firm or corporation, provided that this rule shall not be interpreted to

prevent an optometrist from paying an employee in the regular course of employment, and provided further, that it shall not be construed as a violation of this Act for any optometrist to lease space from an establishment on a percentage or gross receipts basis or to sell, transfer or assign accounts receivable.

- (c) No optometrist shall divide, share, split or allocate, either directly or indirectly, any fee for optometric services or materials with another optometrist or with a physician except upon a division of service or responsibility provided that this rule shall not be interpreted to prevent partnerships for the practice of optometry. This Act does not prohibit an optometrist from being employed on a salary, with or without bonus arrangements, by a licensed optometrist or physician, regardless of the amount of supervision exerted by the employing optometrist or physician over the office in which the employed optometrist works, provided such bonus arrangements, if any, shall not be based in whole or in part on the business or income of any optical company.
- (d) No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometroy in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed. In event of the death or retirement of a partner, the surviving partner or partners practicing optometry in a partnership name may, with the written permission of the retiring partner or the deceased optometrist's widow or other legal representative, as the case

may be, continue to practice with the name of the deceased partner in the partnership name for a period not to exceed one year from the date of his death, or during the period of administration of a deceased partner's estate as provided by Section 4.04(f) of this Act, whichever period shall be the longer.

- (e) No optometrist shall use, cause or allow to be used, his name or professional identification, as authorized by Article 4590e, as amended, Revised Civil Statutes of Texas, on or about the door, window, wall, directory, or any sign or listing whatsoever, of any office, location or place where optometry is practiced, unless said optometrist is actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.
- (f) No optometrist shall practice or continue to practice optometry in any office, location or place of practice where any name, names or professional identification on or about the door, window, wall, directory, or any sign or listing whatsoever, or in any manner used in connection therewith, shall indicate or tend to indicate that such office, location or place of practice is owned, operated, supervised, staffed, directed or attended by any person not actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.
- (g) The requirement of Subsections (e) and (f) of this section that an optometrist be "actually present" in an office, location or place of practice holding his name out to the public shall be deemed satisfied if the optometrist is, as to such office, location or place of practice, either:
- (1) physically present therein more than half the total number of hours such office, location, or place of practice

is open to the public for the practice of optometry during each calendar month for at least nine months in each calendar year; or

- (2) physically present in such office, location, or place of practice for at least one-half of the time such person conducts, directs, or supervises any practice of optometry.
- (h) Nothing in this section shall be interpreted as requiring the physical presence of a person who is ill, injured, or otherwise incapacitated temporarily.
- (i) The requirement of Subsections (e) and (f) of this section that an optometrist be "practicing optometry" at an office, location, or place of practice holding his name out to the public shall be deemed satisfied if the optometrist regularly makes personal examination at such office, location, or place of practice of the eyes of some of the persons prescribed for therein or regularly supervises or directs in person at such office, location or place of practice such examinations.
- (j) The willful or repeated failure or refusal of an optometrist to comply with any of the provisions of this section shall be considered by the board to constitute prima facie evidence that such optometrist is guilty of violation of this Act, and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instance or instances in which it is alleged that the rule was not complied with. Alternatively, or in addition to the above, it shall be the duty of the board to institute and prosecute an action in a court of competent jurisdiction to restrain or enjoin the violation of any of the preceding rules.
- (k) Any optometrist practicing optometry on or after April 15, 1969 in a manner, or under conditions, contrary to Subsections (b), (c), (d), and (f) of this Section 5.13 by virtue of occupying premises under an existing or

negotiated lease in effect on April 15, 1969, shall not be subject to said Subsections (b), (c), (d) and (f) of this Section 5.13 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease expiring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

### Art. 4552—5.14. Lease of premises from mercantile establishment

- (a) In order to safeguard the visual welfare of the public and the optometrist-patient relationship, fix professional responsibility, establish standards of professional surroundings, more nearly secure to the patient the optometrist's undivided loyalty and service, and carry out the prohibitions of this Act against placing an optometric license in the service or at the disposal of unlicensed persons, the provisions of this section are applicable to any optometrist who leases space from and practices optometry on the premises of a mercantile establishment.
- (b) The practice must be owned by a Texas-licensed optometrist. Every phase of the practice and the leased premises shall be under the exclusive control of a Texas-licensed optometrist.
- (c) The prescription files and all business records of the practice shall be the sole property of the optometrist and free from involvement with the mercantile establishment or any unlicensed person. Except, however, that those business records essential to the successful initiation or continuation of a percentage of gross receipts lease of space may be inspected by the applicable lessor.
- (d) The leased space shall be definite and apart from the space occupied by other occupants of the premises. It shall be separated from space used by other occupants

of the premises by solid, opaque partitions or walls from floor to ceiling. Railings, curtains, and other similar arrangements are not sufficient to comply with this requirement.

- (e) The leased space shall have a patient's entrance opening on a public street, hall, lobby, corridor, or other public thoroughfare. The aisle of a mercantile establishment does not comply with this requirement. An entrance to the leased space is not a patient's entrance within the meaning of this subsection unless actually used as an entrance by the optometrist's patients.
- (f) No phase of the optometrist's practice shall be conducted as a department or concession of the mercantile establishment; and there shall be no legends or signs such as "Optical Department," "Optometrical Department," or others of similar import, displayed on any part of the premises or in any advertising.
- (g) The optometrist shall not permit his name or his practice to be directly or indirectly used in connection with the mercantile establishment in any advertising, displays, signs, or in any other manner.
- (h) All credit accounts for patients shall be established with the optometrist and not the credit department of the mercantile establishment. However, nothing in this subsection prevents the optometrist from thereafter selling, transferring, or assigning any such account.
- (i) Any optometrist practicing optometry on or after April 15, 1969, in a manner, or under conditions, contrary to any of the provisions of this Section 5.14 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.14 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the

exercise of any option. Provided, however, that as to any such lease expiring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

#### Art. 4552-5.15. Relationships with dispensing opticians

- (a) The purpose of this section is to insure that the practice of optometry shall be carried out in such a manner that it is completely and totally separated from the business of any dispensing optician, with no control of one by the other and no solicitation for one by the other, except as hereinafter set forth.
- (b) If an optometrist occupies space for the practice of optometry in a building or premises in which any person, firm, or corporation engages in the business of a dispensing optician, the space occupied by the optometrist shall be separated from the space occupied by the dispensing optician by solid partitions or walls from floor to ceiling. The space occupied by the optometrist shall have a patient's entrance opening on a public street, hall, lobby, corridor, or other public thoroughfare. An entrance is not a patient's entrance within the meaning of this subsection unless actually used as an entrance by the optometrist's patients.
- (c) An optometrist may engage in the business of a dispensing optician, own stock in a corporation engaged in the business of a dispensing optician, or be a partner in a firm engaged in the business of a dispensing optician, but the books, records, and accounts of the firm or corporation must be kept separate and distinct from the books, records, and accounts of the practice of the optometrist.
- (d) No person, firm, or corporation engaged in the business of a dispensing optician, other than a licensed optometrist or physician, shall have, own, or acquire any interest in the practice, books, records, files, equipment, or materials of a licensed optometrist, or have, own, or

acquire any interest in the premises or space occupied by a licensed optometrist for the practice of optometry other than a lease for a specific term without retention of the present right of occupancy on the part of the dispensing optician. In the event an optometrist or physician who is also engaged in the business of a dispensing optician (whether as an individual, firm, or corporation) does own an interest in the p. ice, books, records, files, equipment or materials of another licensed optometrist, he shall maintain a completely separate set of books, records, files, and accounts in connection therewith. Any optometrist practicing optometry on or after April 15, 1969 in a manner, or under conditions, contrary to any of the provisions of this Section 5.15 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.15 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease expiring or or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

(e) If, after examining a patient, an optometrist believes that lenses are required to correct or remedy any defect or abnormal condition of vision, the optometrist shall so inform the patient and shall expressly state that the patient has two alternatives for the preparation of the lenses according to the optometrist's prescription: First, that the optometrist will prepare or have the lenses prepared according to the prescription; and second, that the patient may have the prescription filled by any dispensing optician (not naming or suggesting any particular dispensing optician) but should return for an optometrical examination of the lenses. If the patient chooses the first alternative, the optometrist may refer

the patient to a particular dispensing optician for selection of frames and filling the prescription.

(f) If any person, on visiting the premises of any dispensing optician without presenting a prescription written by a licensed phyiscian or optometrist, makes any inquiry or request concerning an examination or the obtaining of any ophthalmic materials or services requiring such a prescription, then the optician or his agent or employee may not respond in any manner except to state in effect that the optician cannot examine the patient or prescribe or fit glasses or lenses, but that the patient seeking such service must go to a licensed physician or optometrist. If there is no further inquiry from the prospective patient, the optician or his agent or employee may not make any further statement of any kind. If, however, the prospective patient makes an inquiry as to where or to whom he may go to obtain such service, the optician or his agent or employee shall give the prospective patient the names and addresses of at least three persons, each of whom is either a licensed ophthalmologist or a licensed optometrist whose practice is located within a radius of five miles from the optician's place of business, or if there are fewer than three of these, the name and address of each licensed ophthalmologist or licensed optometrist whose practice is so located.

#### Art. 4552-5.18. Penalty

A person who violates any provision of this Act is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than \$50 nor more than \$500 or by confinement in the county jail for not less than two months nor more than six months, or both. A separate offense is committed each day a violation of this Act occurs or continues.

#### IN THE

### Supreme Court of the United States

OCTOBER TERM, 1977

DR. E. RICHARD FRIEDMAN, ET AL., Appellants
v.
DR. N. JAY ROGERS, ET AL.

DR. N. JAY ROGERS, ET AL., Appellants
v.
DR. E. RICHARD FRIEDMAN, ET AL.

TEXAS OPTOMETRIC ASSOCIATION, INC., Appellant v.
Dr. N. JAY ROGERS, ET AL.

On Appeal From the United States District Court For the Eastern District of Texas

# MOTION OF THE AMERICAN OPTOMETRIC ASSOCIATION FOR LEAVE TO FILE ITS BRIEF AS AMICUS CURIAE, WITH BRIEF ATTACHED

ELLIS LYONS
BENNETT BOSKEY
EDWARD A. GROOBERT
EDWIN E. HUDDLESON, III
VOLPE, BOSKEY AND LYONS
918 16th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 737-6580

Attorneys for the American Optometric Association

#### IN THE

### Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1163

DR. E. RICHARD FRIEDMAN, ET AL., Appellants

V.

Dr. N. JAY ROGERS, ET AL.

No. 77-1164

DR. N. JAY ROGERS, ET AL., Appellants

V.

Dr. E. RICHARD FRIEDMAN, ET AL.

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION, INC., Appellant

V.

Dr. N. JAY ROGERS, ET AL.

On Appeal From the United States District Court For the Eastern District of Texas

MOTION OF THE AMERICAN OPTOMETRIC ASSOCIATION FOR LEAVE TO FILE ITS BRIEF AS AMICUS CURIAE The American Optometric Association hereby moves for leave to file the attached brief as amicus curiae in support of the position of the Texas Attorney General and the Texas Optometric Association, Inc. The basis for this motion is the following:

- 1. We have obtained and lodged with the Clerk written consents for the filing of this brief from Dr. E. Richard Friedman, et al. (appellants in No. 77-1163, appellees in No. 77-1164) and from the Texas Optometric Association, Inc. (appellant in No. 77-1186). Dr. N. Jay Rogers, et al. (appellants in No. 77-1164, appellees in Nos. 77-1163 and 77-1186) have withheld consent, thereby making this motion necessary.
- 2. The American Optometric Association is a non-profit national professional association incorporated in Ohio. It consists of more than 20,000 members, who are licensed doctors of optometry, optometry students, and educators. The objects of the Association, as set forth in its Constitution, "are to improve the vision care and health of the public and to promote the art and science of the profession of optometry."
- 3. A doctor of optometry is a primary provider of vital health care services who examines, diagnoses and treats conditions of the vision system. He is specifically educated, trained and licensed to examine the eyes and related structures to determine the presence of vision problems, eye disease or other abnormalities. Where appropriate, he prescribes and may dispense and adapt lenses or other optical aids. He may also use vision training or other methods of treatment to preserve or restore maximum efficiency of vision.

4. As the national professional organization representing the optometric association, the Association is vitally interested not only in legislation to improve the practice and standards of the profession itself, but also in legislation ensuring competent vision care and quality ophthalmic materials and protecting the public against deception and improper practices by any eye care provider. The Association also is vitally interested, from a national perspective, in important litigation involving challenges to the validity of such legislation. This is particularly true where, as here, the statute is challenged on federal constitutional grounds and the implications of the case are national in scope.

1:

- 5. With the consent of the parties, the American Optometric Association participated as amicus curiae in this Court in Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955), filing and arguing orally before the Court. The Association filed a brief amicus curiae with the consent of the parties in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). And in Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963), the Association filed a brief amicus curiae, the Court having granted the Association's motion for leave to file such a brief.
- 6. This case is also of interest to the Association because one of the Texas statutes at issue, Texas Optometry Act § 2.02, provides that two-thirds of the Texas Optometry Board must be members of "a state optometric association recognized by and affiliated with the American Optometric Association."

For the foregoing reasons, the motion for leave to file the attached brief amicus curiae should be granted.

### Respectfully submitted,

ELLIS LYONS
BENNETT BOSKEY
EDWARD A. GROOBERT
EDWIN E. HUDDLESON, III
VOLPE, BOSKEY AND LYONS
918 16th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 737-6580

Attorneys for the American Optometric Association

**JUNE 1978** 

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#### IN THE

### Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1163

DR. E. RICHARD FRIEDMAN, ET AL., Appellants

V.

DR. N. JAY ROGERS, ET AL.

No. 77-1164

Dr. N. JAY ROGERS, ET AL., Appellants

V.

DR. E. RICHARD FRIEDMAN, ET AL.

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION, INC., Appellant

W

DR. N. JAY ROGERS, ET AL.

On Appeal From the United States District Court For the Eastern District of Texas

BRIEF FOR THE AMERICAN OPTOMETRIC ASSOCIATION AS AMICUS CURIAE

#### STATUTES INVOLVED

The Texas Optometry Act, Art. 4552, Tex.Rev.Civ. Stat.Ann. (Acts 1969, 61st Leg., p.1298, ch.401), provides in relevant part:

Art. 4552-5.13. Professional responsibility

(d) No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed. In the event of the death or retirement of a partner, the surviving partner or partners practicing optometry in a partnership name may, with the written permission of the retiring partner or the deceased optometrist's widow or other legal representative, as the case may be, continue to practice with the name of the deceased partner in the partnership name for a period not to exceed one year from the date of his death, or during the period of administration of a deceased partner's estate as provided by Section 4.04(f) of this Act, whichever period shall be the longer.

Art. 4552-2.02. Qualifications of members

To be qualified as a member of the [Texas Optometry B]oard a person must be a licensed optometrist who has been a resident of this state actually engaged in the practice of optometry for the period of five years immediately preceding his appointment. A person is disqualified from ap-

pointment to the board if he is a member of the faculty of any college of optometry, if he is an agent of any wholesale optical company, or if he has a financial interest in any such college or company. At all times there shall be a minimum of two-thirds of the board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association.

#### INTEREST OF THE AMERICAN OPTOMETRIC ASSOCIATION

The interest of the American Optometric Association [AOA] is set forth in the Association's motion for leave to file this brief amicus curiae in support of the position of the Texas Attorney General and the Texas Optometric Association, Inc.

#### SUMMARY OF ARGUMENT

I. The constitutional validity of section 5.13(d) of the Texas Optometry Act, which prohibits optometrists from practicing under a "trade name," is established by two independent grounds. The statute is valid, first of all, as a reasonable regulation of optometrists' conduct, with only an incidental prohibition against the advertising of illegal conduct. Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388-389 (1972). There is a sphere of conduct by optometrists, separate from speech, that is barred by the "trade name" statute. This conduct consists of a form of business organization where a trade name owner employs individual optometrists and may often control the volume of patients they treat. This method of operation, the Texas legislature could find, was conducive to mass-produced, depersonalized and often inferior professional eye care.

Texas constitutionally could prohibit this type of business conduct by optometrists. See Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Having done so, the state quite properly could ban advertising for the prohibited "trade name" conduct. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, supra. This is all that the Texas "trade name" statute does. No special First Amendment justification is required for the statute. Id.

Quite apart from these considerations, Texas' power to outlaw misleading advertising independently supports the "trade name" statute's restrictions on commercial speech. "Trade name" advertising by Texas optometrists in earlier years proved to be misleading to consumers. See Texas State Bd. of Examiners v. Carp, 412 S.W.2d 307 (Tex.S.Ct.), cert. denied, 389 U.S. 52 (1967). It communicated the misimpression that the trade name organization (rather than an individual optometrist) was professionally responsible for and licensed to provide optometric eye care. Id. Moreover, it falsely implied that differences in trade names meant the existence of competition, and differences in optometric care at different trade name locations. Id.

Whether or not Texas has outlawed "trade name" optometric practice and conduct, it could rationally bar "trade name" advertising by optometrists to prevent these harms. See Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977). This is true notwithstanding the theoretical availability of "less restrictive" state laws requiring additional disclosures to compensate for the misleading aspects of a "trade name" optometric advertisement. To hold otherwise would mean that states (and the federal government) could never

ban a generic form of commercial advertising as misleading.

II. The three-judge court correctly upheld the requirement that two-thirds of the six-man Texas Optometry Board be members of "a state optometric association recognized by and affiliated with the American Optometric Association." [Texas Optometry Act § 2.02.] Whatever the private views of the two-thirds majority, the composition of the Board does not create any objective "chill" on optometrists' First Amendment rights (now recognized and accepted in Texas) of commercial speech and advertising. This case presents no Article III "case or controversy" with respect to the alleged "pecuniary" bias of the Board in exercising its adjudicatory functions. Compare Gibson v. Berryhill, 411 U.S. 564 (1973). The Texas Board is not disqualified from exercising its rule-making powers by Rogers' claims that the two-thirds majority allegedly have a pecuniary interest or fixed point of view. K. Davis, Administrative Law of the Seventies § 12.01 (July 1977 Cum. Supp. p.114).

The Texas legislature could rationally believe that the challenged two-thirds membership requirement would ensure that the majority of the Board would be economically independent optometrists, more likely than high-volume "commercial" optometrists to emphasize high quality eye care and the enforcement of the Texas Optometry Act. No private group is totally excluded from the Texas Board. Nor is membership on the Texas Board conditioned, directly or indirectly, on an optometrist's willingness to forego his First Amendment rights of commercial speech. The membership classification, which is rooted in health care considerations, easily passes muster under traditional

equal protection analysis. See Weinberger v. Salfi, 422 U.S. 749, 769-774 (1975). Since the classification is neither "suspect" nor bears upon a fundamental constitutional interest, the "irrebutable presumption" doctrine does not apply here. Id.

## ARGUMENT

 THE TEXAS OPTOMETRY ACT'S BAN ON "TRADE NAME" OPTOMETRIC PRACTICE COMPORTS WITH THE FIRST AMENDMENT.

The major First Amendment issue in these consolidated cases concerns the validity of section 5.13(d) of the Texas Optometry Act, which prohibits optometrists from practicing under a "trade name". These cases do not involve a blanket ban on optometrists' advertising. Nor does the "trade name" statute raise any question of restrictions on political speech or conduct.

A. The "Trade Name" Practice Ban Is Valid As A Regulation Of Conduct, With An Incidental Prohibition Against The Advertising Of Illegal Conduct.

Two independent grounds support the constitutionality of Texas' ban on "trade name" optometric prac-

tice. To begin with, the statute is valid as a reasonable regulation of conduct by optometrists that strikes at commercial speech only to the extent of prohibiting the advertising of illegal conduct. Cf. Ohralik v. Ohio State Bar Ass'n (S.Ct.No. 76-1650, May 30, 1978) (slip op. p.8); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388-389 (1972). There is a sphere of conduct, separate from speech, that is validly banned by the Texas "trade name" statute. See also United States v. O'Brien, 391 U.S. 367, 377 (1968). Texas quite properly could outlaw advertising for prohibited "trade name" conduct. when it banned the conduct itself. Pittsburgh Press Co., supra. This is all that the Texas statute does. No special First Amendment justification is required for the statute. Id.

Texas' ban on "trade name" optometric practice strikes at far more than "trade name" advertising to the general public. The statute bars an entire form of business organization and conduct. Based on experience in Texas (see App. 106-107, 109-113, 115, 122-126, 128-131), the Texas legislature could find that this type of organization and conduct by optometrists was conductive to mass-produced, depersonalized and often inferior professional eye care. These harms were traceable, in Texas' experience, to factors such as trade name owners' control over individual optometrists and the volume of patients they must treat in a "trade name" practice. See Texas State Bd. of Examiners v. Carp, 412 S.W.2d 307 (Tex. S.Ct.), cert. denied, 389 U.S. 52 (1967); App. 103-105, 109, 133-136, 138. The complex of harms, which the Texas statute seeks to avert, are not derived solely from the way consumers can be expected to react to "trade

<sup>&</sup>lt;sup>1</sup> No appeal has been taken from that part of the three-judge court's judgment that strikes down Texas' blanket ban on price advertising by optometrists (see 438 F.Supp. at 429).

<sup>&</sup>lt;sup>2</sup> Texas' ban on "trade name" optometric practice is strictly limited to a "commercial" context. Compare First National Bank of Boston v. Bellotti (S.Ct. No. 76-1172, April 26, 1978). It applies only "in connection with [the] practice of optometry," which section 1.02 of the Texas Optometry Act defines as the actual examination and measurement of eyes and the fitting of corrective lenses or prisms. The statute is part of Texas' regulation of vital health care services. The states have a special responsibility for the regulation of the professions concerned with health care. Cf. Ohralik v. Ohio State Bar Ass'n (S.Ct. No. 76-1650, May 30, 1978) (slip op. p. 12).

name" advertising. Many of these harms would arise even if "trade name" optometric practice had no communicative significance whatever. Texas' ban on "trade name" optometric practice therefore "furthers an important or substantial governmental interest [that] is unrelated to the suppression of free expression." United States v.-O'Brien, supra, 391 U.S. at 377.

The whole pattern of conduct associated with "trade name" optometric practice has validly been made unlawful in Texas. Cf. Head v. New Mexico Board, 374 U.S. 424 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). The "trade name" practice prohibition is rooted in the state's legitimate desire to ensure that commercial pressures do not undercut the provision of high quality eye care by optometrists. The validity of this type of law-which "attempt[s] to free the profession, to as great an extent as possible, from all taints of commercialism" (Williamson v. Lee Optical Co., supra, 348 U.S. at 491)—is clearly established under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See Williamson v. Lee Optical Co., supra [upholding Oklahoma statute barring commercial retailers from renting space in retail stores to optometrists]; Roschen v. Ward, 279 U.S. 337 (1929) [upholding New York statute barring retail sale of eyeglasses without attending licensed physician or optometrist]; Wall v. American Optometric Association, 379 F.Supp. 175 (N.D.Ga.), affirmed, 419 U.S. 888 (1974) [upholding Georgia rule prohibiting practice of optometry in office identified with a mercantile establishment]. As

this Court recently emphasized, "the State bears a special responsibility for maintaining standards among members of the licensed professions." Ohralik v. Ohio State Bar Ass'n (S.Ct. No. 76-1650, May 30, 1978) (slip op. p.12).

The only restrictions on commercial speech entailed by the "trade name" practice ban, in section 5.13(d) of the Texas Optometry Act, are restrictions on the advertising of illegal conduct. The three-judge court therefore erred in invalidating Texas' ban on "trade name" optometric practice. "Any First Amendment interest which might be served by advertising an ordinary commercial proposal \* \* \* is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1972); see, also, Note, Freedom of Expression in a Commercial Context, 78 Harv.L.Rev. 1191, 1195 (1965).

Optometrists who wish to engage in "trade name" practice and conduct cannot immunize themselves from the ban of Texas law by expressing a desire to advertise the very conduct that Texas has outlawed. A "State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a

<sup>&</sup>lt;sup>3</sup> See, also, North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973) [upholding North Dakota statute requiring ownership of pharmacies to be by registered pharmacist,

or by corporation or association with majority stock owned by registered pharmacists actively engaged in operation of the pharmacy]; Semler v. Oregon State Bd of Dental Examiners, 294 U.S. 608 (1935) [upholding Oregon statute denying corporations the right to practice dentistry]; Garcia v. Texas State Bd of Medical Examiners, 384 F.Supp. 434 (W.D.Tex. 1974), affirmed, 421 U.S. 995 (1975) [upholding Texas statute barring laymen from forming corporation for practice of medicine].

component of that activity." Ohralik v. Ohio State Bar Ass'n (S.Ct. No. 76-1650, May 30, 1978) (slip op. p.9).

B. Texas' Power To Outlaw Misleading Advertising Independently Supports The Statute's Restrictions On Commercial Speech.

The other independent ground supporting the Texas statute, as against Rogers' challenge that it improperly restricts commercial speech, is rooted in the state's valid power to restrict misleading advertising. See Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977); Young v. American Mini Theatres, 427 U.S. 50, 68 (1976). Whether or not Texas outlaws "trade name" optometric practice and conduct, it may ban "trade name" advertising directly if such advertising is misleading or potentially deceptive. See Federal Trade Comm'n v. Algoma Lumber Co., 291 U.S. 67 (1934) [trademark "California White Pine" banned as misleading by FTC].

The Texas legislature could conclude, based on extensive experience with "trade name" optometry in Texas, that "trade name" advertising by optometrists was significantly misleading. Though Texas licenses only individual optometrists, trade name advertising misled some consumers into thinking that the trade name organization was professionally responsible for and licensed to provide optometric eye care. Texas State Bd of Examiners v. Carp, 412 S.W.2d 307, 312 (Tex.

S.Ct.), cert. denied, 389 U.S. 52 (1967). Optometrists advertising under a trade name often gave the impression that certain optometrists were present at a particular office, whereas in fact they were not. Id., 412 S.W.2d at 313. Moreover, Texas experienced several instances where one individual owned many different trade names and advertised them as separate optometric entities, even though optometrists were "shifted from one location to the other" at the whim of the overall owner, trade names were changed at random, and each trade name entity "dispense[d] the same optical goods and services and use[d] the same kind of equipment." Id., 412 S.W.2d at 311-312; App. 101, 103. This trade name advertising was misleading because it implied the existence of competition, and differences in optometric care at different trade name locations, that simply did not exist. Cf. Consolidated Book Publishers v. Federal Trade Comm'n, 53 F.2d 942 (7th Cir. 1931), cert. denied, 286 U.S. 553 (1932).

To be sure, trade name advertising by optometrists (assuming that trade name practice were legal) might incidentally communicate some truthful commercial information. But such advertising can still be misleading. The Texas legislature could reasonably conclude, based on actual experience in Texas, that trade name

<sup>&#</sup>x27;In seeking to prevent this kind of consumer confusion, the Texas "trade name" statute is similar to the laws of more than twenty other states that bar optometric practice under an assumed name or any name other than that of the optometrist (see Appendix A, infra, pp. 1a-4a).

The court of appeals in Consolidated Book Publishers upheld an FTC determination that banned the sale of a cyclopedia under two different names as an "unfair" method of competition. See, also, Texas Deceptive Trade Practices—Consumer Protection Act (Tex. Bus. & Comm. Code, Acts 1973, 63d Leg., p. 322, ch. 143 (effective May 21, 1973)) § 17.46(b)(2), (3) [misleading commercial practices defined to include "causing confusion" as to "the source, sponsorship, approval, or certification of goods or services" or as to "affiliation, connection, or association with, or certification by, another"].

optometric advertising was a generic form of commercial speech that entailed a significant potential for deception.

Where one form of commercial speech consists of half truths or entails a significant potential for deception, it can be legislatively banned in that form, even where the misleading speech also contains some truthful information. This is true notwithstanding the theoretical availability (see also 438 F.Supp. at 431 n.3) of "less restrictive" state laws requiring additional disclosures to compensate for the deceptive aspects of a misleading commercial communication. To hold otherwise would mean that states (or the federal government) could never ban a generic form of advertising as misleading."

The overbreadth doctrine of the First Amendment has no proper application in this commercial advertising context. See Ohralik v. Ohio State Bar Ass'n (S. Ct.No. 76-1650) (slip op. p.15 n.20); Bates v. State Bar of Arizona, 433 U.S. 350, 380-381 (1977); Virginia Pharmacy Bd. v. Virginia Consumers Council, 425 U.S. 748, 772 n.24 (1976). There is at most only a theoretical possibility of overbroad application, and the Texas statute legitimately bans a wide range of misleading advertising. See also Parker v. Levy, 417 U.S. 733, 760-761 (1974); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

Texas today allows price advertising by optometrists. Indeed, the state leaves open "ample alternative channels for communication" in nondeceptive words of all truthful commercial information about optometrists. See Virginia Pharmacy Bd. v. Virginia Consumers Council, supra, 425 U.S. at 771. Within this context, Texas constitutionally may ban "trade name" advertising by optometrists, as a misleading generic form of commercial speech. In the absence of controlling federal legislation, the Constitution permits each state to decide for itself whether to permit or prohibit this narrow form of commercial advertising, in light of local conditions.

II. NEITHER THE FIRST AMENDMENT NOR THE DUE PROC-ESS OR EQUAL PROTECTION CLAUSES OF THE FOUR-TEENTH AMENDMENT BAR TEXAS' REQUIREMENT THAT TWO-THIRDS OF THE TEXAS OPTOMETRY BOARD BE MEMBERS OF AN AOA-AFFILIATED STATE OPTOMETRIC ASSOCIATION.

Two-thirds of the six-man Texas Optometry Board are required to be members of "a state optometric association which is recognized by and affiliated with the American Optometric Association." [Texas Optometry Act § 2.02.] The only such state association is the Texas Optometric Association [TOA] (App. 234). The

This case involves a test of basic legislative power to regulate one form of commercial advertising, not a choice of proper procedures for agencies selecting remedies to combat misleading advertising. Compare Siegel v. Federal Trade Comm'n, 327 U.S. 608 (1946) [before ordering ban on misleading trademark, FTC must first consider whether deceptive aspect of the mark can be eliminated by requiring affirmative disclosures]; Federal Trade Comm'n v. Royal Milling Co., 288 U.S. 212, 217 (1933) [same].

Two note that the Federal Trade Commission very recently promulgated a trade regulation rule on advertising ophthalmic goods and services. 43 Fed. Reg. 23992-24008 (June 2, 1978). The impact of this rule on state laws banning some categories of commercial advertising as misleading is not entirely clear. However, the FTC rule does not seem to disturb state laws regulating conduct by optometrists and incidentally barring the advertising of illegal conduct. The FTC rule, which will become effective July 3, 1978 unless stayed, is being challenged in court. See American Optometric Association v. Federal Trade Comm'n (C.A. D.C. No. 78-1461).

three-judge court correctly upheld the two-thirds membership requirement against challenges based on the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

1. Texas has accepted the three-judge court's ruling that the state must permit truthful commercial advertising by optometrists. There is no evidence in this record to suggest, and this Court cannot assume, that the Texas Optometry Board will disregard this settled constitutional result or will illegally attempt to "chill" optometrists who wish to advertise. Cf. Withrow v. Larkin, 421 U.S. 35, 47 (1975); O'Shea v. Littleton, 414 U.S. 488, 495-496 (1974); and see App. 69-70, 375. Ample court remedies exist in the unlikely event that such abuses might arise. The mere existence of the Texas Optometry Board, as presently constituted, does not create a cognizable "chill" on optometrists' First Amendment rights to advertise. See Laird v. Tatum, 408 U.S. 1, 11 (1972). This conclusion is buttressed by the special hardiness of commercial advertising and the continuing incentives for those optometrists who wish to advertise to do so, as permitted under Texas law. See Bates v. State Bar of Arizona, 433 U.S. 350, 380-383 (1977).

2. This case does not involve any threatened or pending license revocation proceedings or other adjudicatory action by the Texas Optometry Board. Compare Gibson v. Berryhill, 411 U.S. 564 (1973). Questions about the alleged "pecuniary" bias of the Board (Rogers J.S. p.15) may or may not arise in future cases, depending upon what issues the Board resolves in a particular adjudicatory context. No Article III "case or controversy" is presented with respect to appellant Rogers' claims of adjudicatory bias, and

there is no occasion to address these claims now. See also Christian v. New York State Department of Labor, 414 U.S. 614, 622-624 (1974).

Moreover, Rogers' complaints about the "viewpoint" and "basic belief[s]" of the TOA majority on the Texas Board (Rogers J.S. pp.12,13,14) do not establish a due process violation in the composition of the Board. A "crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." K. Davis, Administrative Law Treatise § 12.01 (1958 ed.). See Hortonville Joint School District No. 1 v. Hortonville Education Ass'n. 426 U.S. 482, 493 (1976); Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 701 (1948); Carolina Environmental Study Group v. United States, 510 F.2d 796, 801 (D.C.Cir. 1975). Rogers' claims that the TOA majority has a pecuniary interest or fixed point of view clearly do not disqualify the Texas Board from exercising its rule-making powers under Texas Optometry Act § 2.14. K. Davis, Administrative Law of the Seventies § 12.01 (July 1977 Cum. Supp. p.114).

3. Equally without merit are Rogers' equal protection challenges to the composition of the Texas Board. Traditionally, states have often required their administrative boards to include some members from particular private organizations with expertise (and also a viewpoint and possible economic interest) in the regulated subject matter area. Texas is one of thir-

<sup>\*</sup>The many cases that uphold statutes requiring state board members to belong to a particular private organization, or requiring members to be nominated by such organizations, include: Seidenberg v. New Mexico Bd of Medical Examiners, 80 N.M. 135, 452 P.2d 469, 472-473 (N.M. 1969); In re Opinion of the Justices, 252 Ala. 559, 42 So.2d 56 (Ala. 1949); Prosterman v. Tennessee

teen states that either require some members of their optometry boards to belong to a state optometric association, or require the State to select some board members from a list of nominees prepared by such an association. See Appendix B, *infra*, pp. 5a-6a. The courts have consistently upheld these statutes against due process and equal protection attacks. See, *e.g.*, *Mc-Crory* v. *Wood*, 277 Ala. 426, 171 So.2d 241, 245 (Ala. 1965); *Marks* v. *Frantz*, 179 Kan. 638, 298 P.2d 316, 322-325 (Kan. 1956).

Given its history, Texas legitimately could require that a majority of the Texas Board be knowledgeable optometrists likely to be economically independent, as well as likely to emphasize high quality eye care and to enforce the legislative rules of the Texas Optometry Act. The Texas legislature could rationally believe (see App. 234-237, 249-252, 253-254) that these qualities are more likely to be found in members of the Texas Optometry Association [TOA] than in "commercial" optometrists who often are subject to the economic pressures of a high-volume commercial practice. See App. 108, 111, 122-126, 128-131, 136-139, 158-159, 160-161, 244-245, 307, 310, 311, 313. The challenged two-thirds membership rule for the Texas Board is thus rationally related to the achievement of legitimate state goals. See New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Texas constitutionally could require that two-thirds of the Texas Optometry Board be members of a professional association, without "substantial restraint

upon \* \* \* freedom of association" (NAACP v. Alabama, 357 U.S. 449, 462 (1958)). The challenged Texas statute makes a distinction between two groups (the two-thirds majority that belong to an AOA-affiliated state optometric association and the one-third that do not) that is based on economic and health care reasons, not political or free speech reasons. Neither group is totally excluded from the Board. [Texas Optometry Act § 2.02.] Membership on the Texas Board is not conditioned, directly or indirectly, on an optometrist's willingness to forego his First Amendment right to engage in truthful commercial advertising. The Texas Board includes non-TOA members who commercially advertise (App. 9, 389). Moreover, commercial speech rights may also be exercised by the twothirds majority of the Texas Board who are TOA members. The valid state interests supporting the twothirds membership requirement—which is designed to ensure independent decision-making and an emphasis on high quality eye care by the Board-justify any possible incidental impact on associational freedoms. Cf. Buckley v. Valeo, 424 U.S. 1, 14-23 (1976).

State Bd. of Dental Examiners, 168 Tenn. 16, 73 S.W.2d 687 (Tenn. 1934); Bradley v. Board of Zoning Adjustment of City of Boston, 255 Mass. 160, 150 N.E. 892, 894 (Mass. 1926).

Rogers' Jurisdictional Statement errs in claiming (p. 5) that the AOA Code of Ethics and Rules of Practice, which TOA has chosen to recognize and enforce (see App. 415), "prohibit any form of advertising". Without discussing the history and meaning of the Supplements to the AOA Code, it is sufficient to point out that the "Supplements" upon which Rogers relies were deleted in 1976.

The current AOA statement concerning optometrists' advertising is contained in its "Standards of Conduct" section titled "Informing the Public" (effective March 10, 1976). The section simply states: "An optometrist should honor the applicable provisions of valid State and Federal laws and rules regarding the advertising of ophthalmic materials and the disseminating of information regarding professional services."

The two-thirds membership requirement for the Texas Board creates a classification that is neither "suspect," nor bears upon a fundamental constitutional interest. See Weinberger v. Salfi, 422 U.S. 749, 769-774 (1975). The membership classification, which is rooted in health care considerations, easily passes muster under traditional equal protection analysis. Id.

Rogers' reliance on the "irrebutable presumption" doctrine to attack the two-thirds membership requirement (Rogers J.S. pp. 15, 16) is misplaced. That very limited doctrine does not apply here, since the Texas statutory classification is neither suspect nor bears upon fundamental constitutional rights. To rule otherwise would turn the "irrebutable presumption" doctrine into "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." Weinberger v. Salfi, supra, 422 U.S. at 772; see also Note, The Irrebutable Presumption Doctrine in the Supreme Court, 87 Harv. L.Rev. 1534 (1974).

# CONCLUSION

The challenged Texas statutes, prohibiting "trade name" optometric practice and requiring that two-thirds of the Texas Optometry Board be members of an AOA-affiliated state optometric association (Texas Optometry Act §§ 5.13(d), 2.02), are constitutionally valid. The judgment in Nos. 77-1163 and 77-1186 should be reversed, while the judgment in No. 77-1164 should be affirmed.

# Respectfully submitted,

ELLIS LYONS
BENNETT BOSKEY
EDWARD A. GROOBERT
EDWIN E. HUDDLESON, III
VOLPE, BOSKEY AND LYONS
918 16th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 737-6580

Attorneys for the American Optometric Association

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APPENDIX A

There are more than twenty states besides Texas that prohibit optometrists from practicing under an assumed name or any name other than that of the optometrist:

- 1. Alabama: Ala.Code tit.34 \ 22-23(11) [optometrist's license may be revoked for practicing "under a name other than one's own name as set forth on the license certificate"]
- 2. Arizona: Ariz.Rev.Stat. § 32-1755 (11) [optometrist's license may be revoked for the "practice of optometry under a false or assumed name'']
- 3. Hawaii: Haw.Rev.Stat. § 459-9(9) [Hawaii board may refuse to issue certificate to optometrist, if he uses "any name in connection with his practice other than the name under which he is licensed to practice \* \* \* '']
- 4. Idaho: Idaho Code § 54-1510(2) [optometrist's license may be revoked for "[p]racticing optometry under a false or assumed name \* \* \* '']
- 5. Illinois: Ill. Ann. Stat. ch.91 § 105-13(f) (Smith-Hurd) [optometrist's license may be revoked for "[a]dvertising, practicing or attempting to practice under a name other than the full name as shown on his or her certificate of registration"]
- 6. Iowa: Iowa Code Ann. § 154.4 (West) [optometrist "who shall practice or advertise as practicing his profession, under a false or assumed name shall by such advertising mislead the public to believe that he is practicing for on behalf of an unlicensed person, shall have his license revoked."]
- 7. Kansas: Kan.Stat. § 65-1510 [unlawful for any person to "engage in the practice of optometry under any name or title other than his or her own''l

# APPENDIX

- 8. Kentucky: Ky.Rev.Stat. § 320.300(5) [unlawful for any person to "practice optometry under any name other than his own"]
- 9. Maine: Me.Rev.Stat. tit.32 § 2582(2) [optometrist's license may be revoked if "such person practices under a name other than that given in the certificate of registration"]
- 10. Massachusetts: Mass.Gen.Laws Ann. ch. 112 § 72 (West) ["No optometric practice, other than an optometric clinic approved by the board and operated and conducted on an non-profit basis by a school or college of optometry or an association of registered optometrists, shall be conducted under any name other than that of the optometrist or optometrists actually conducting such practice."]
- 11. Missouri: Mo.Ann.Stat. § 336.110(6) (Vernon) [optometrist's license may be revoked for "[a]dvertising, practicing or attempting to practice under a name other than one's own"]
- 12. Montana: Mont.Rev.Codes Ann. § 66-1302(6) [unlawful for any person to "practice optometry under a false or assumed name"]
- 13. Nevada: Nev.Rev.Stat. § 636.350 [optometrist "shall not be entitled to practice under an assumed name"]
- 14. New Mexico: N.M. Stat.Ann. § 67-1-11(D) [optometrist's license may be revoked for "attempting to practice under a name other than one's own"]
- 15. North Carolina: N.C.Gen.Stat. § 90-125 [with some exceptions, unlawful for optometrist "to advertise, practice, or attempt to practice under a name other than his own"]

- 16. Oklahoma: Okla.Stat.Ann. tit. 59 § 585(f) (West) ["No person or persons shall practice optometry under any name other than his or her own proper name " " "]
- 17. Oregon: Ore.Rev.Stat. § 683.180(5) [no person shall "[p]ractice optometry under a false or assumed name"]
- 18. Tennessee: Tenn.Code Ann. § 63-822(f) [optometrist's license may be revoked for "[p]racticing under any name other than his or her own"]
- 19. Utah: UTAH CODE ANN. § 58-16-14 (6) ["unprofessional conduct" for optometrist to engage in "[a]dvertising, practicing or attempting to practice under a name other than his own"]
- 20. Vermont: Vt.Stat.Ann. tit. 1695(2) [optometrist's certificate may be revoked for "[p]racticing under an assumed name"]
- 21. Virginia: Va.Code § 54-388.2(g) [optometrist's certificate may be revoked for "advertising, practicing or attempting to practice under a name other than one's own name as set forth on the certificate of registration".
- 22. Washington: Wash.Rev.Code § 18.53.140(5) [unlawful for any person to "practice optometry under a false or assumed name • "]
- 23. West Virginia: W.VA.Code § 30-8-8 [optometrist's certificate may be revoked for "advertising, practicing, or attempting to practice under a name other than one's own"]

See also Cal.Code (Bus. & Prof.) § 3125 (West) ["It is unlawful to practice optometry under a false or assumed name. However, the board may issue written permits authorizing an optometric group or optometric corporation of three or more duly licensed optometrists to use a name specified in the permit in connection with its practice."]; Del. Code tit.24 § 2113(F) ["No optometrist

shall cause or permit himself to be listed in a telephone directory under any name other than the name in which he is registered with the Board as holder of a valid, unrevoked license to practice in this State."]; N.J.STAT. ANN. § 45:12-11(i) [no optometrist shall list "any trade or corporate name"].

# APPENDIX B

Texas is one of thirteen states that either require some members of their optometry boards to belong to a state optometric association, or require the state to select board members from a list of nominees prepared by such an association:

- 1. Arkansas: Ark.Stat.Ann. § 72-802 (1957) [Governor must select from list submitted by Arkansas Optometric Association]
- 2. Connecticut: Conn.Gen.Stat.Ann. § 20-128 (West) (1977) ["The Connecticut Optometric Society may submit to the governor a list of names from which appointees shall be chosen, subject to section 4-10, to fill any position to be held by an optometrist."]
- 3. Delaware: Del.Code tit 24 § 2102(e) [Governor must select from list submitted by Delaware Optometric Association]
- 4. Kentucky: Ky.Rev.Stat. § 320.230(1) (1976) [Governor must select four-fifths of Board from list submitted by Kentucky Optometric Association]
- 5. Maryland: Md.Ann.Code art. 43 § 368 (1969) ["The Board shall be selected from a list of ten names endorsed by the Maryland Association of Optometrists."]
- 6. Mississippi: Miss.Code Ann. § 73-19-7 (1974) [Governor must select from list submitted by Mississippi Optometric Association]
- 7. Nebraska: Neb.Rev.Stat. § 71-117 (1973) [if state optometric association submits list, then state Department of Health must appoint from the list]
- 8. New Mexico: N.M.Stat.Ann. § 67-1-4(B) [Governor must select from list submitted by the state organization affiliated with AOA]

- 9. North Carolina: N.C.GEN.STAT. § 90-116 ["The Board shall be elected by the North Carolina State Optometric Society and commissioned by the Governor • "]
- 10. North Dakota: N.D.Cent.Code § 43-13-03 [members of state board must be members in good standing of North Dakota optometric association]
- 11. South Carolina: S.C.Code § 40-37-40 (1976) [five board members to be nominated "at meetings called by the president of the South Carolina Optometric Association"]
- 12. Tennessee: Tenn.Code Ann. § 63-805 [vacancies on board shall be filled by governor from two lists, one compiled by State Optometric Association, the other by the Associated Tennessee Optometrists]
- 13. Texas: Tex.Rev.Civ.Stat.Ann. art 4552-2.02 (Vernon) [two-thirds of board must be "members of a state optometric association which is recognized by and affiliated with the American Optometric Association."]

See also Fla.Stat.Ann. § 463.02 (West) [Florida Optometric Association shall make recommendations to the Governor for appointments to the board]; Nev.Rev.Stat. § 636.040 [state optometric association "may" make recommendations which Governor "may" accept]; N.J.Stat.Ann. § 45: 1-2.2 (West) [Governor "shall give due consideration to, but shall not be bound by, recommendations submitted by the appropriate professional organizations of this State"]; Va.Code § 54-372 [Governor "may" make appointments to board from list submitted by Virginia Optometric Association, but "[i]n no case shall the Governor be bound to make any appointment from among the nominees of the Association."]

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